Supreme Court, U.S.
FILED
(1) 001015 DEC 22 2000
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

STAFF SERGEANT JOHN B. SWIFT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether petitioner's act of producing an incriminating document in response to a direct order by a military superior had a compelled testimonial aspect to which his Fifth Amendment privilege against self-incrimination applied where the act of production itself served as the basis for his false statement conviction, proof of which required an intent to deceive.

II.

Whether the "required records" exception to the Fifth Amendment extends to records not specifically required by regulation to be produced nor required by regulation to be maintained.

III.

Whether the United States Court of Appeals for the Armed Forces exceeded its authority under Article 67(c), U.C.M.J., 10 U.S.C. § 867(c), by assessing the appropriateness of petitioner's sentence after setting aside his conviction in part.

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The petitioner, Staff Sergeant John B. Swift, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on August 31, 2000, rendered final by that court's denial of his petition for reconsideration on September 28, 2000.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, reported at *United States v. Swift*, 53 M.J. 439 (2000), is located at Appendix A. The order of the United States Court of Appeals for the Armed Force denying petitioner's petition for reconsideration is located at Appendix B. The unpublished opinion of the United States Air Force Court of Criminal Appeals (No. ACM 32447, December 4, 1997) is located at Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on August 31, 2000, and petitioner's petition for reconsideration was denied on September 28, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) and 10 U.S.C. § 867(a)(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in relevant part, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

Article 67(c), U.C.M.J., 10 U.S.C. § 867(c), provides that "[t]he Court of Appeals for the Armed Forces shall take action only with respect to matters of law."

STATEMENT OF THE CASE

Procedural History:

On September 17 and 18, 1996, the petitioner was tried by a general court-martial consisting of officer members convened at Shaw Air Force Base, South Carolina. Contrary to his pleas, the petitioner was found guilty of two specifications of making false official statements (Specifications 1 and 2 of Charge I) in violation of Article 107, Uniform Code of Military Justice [hereinafter cited as U.C.M.J.], 10 U.S.C. § 907, as well as two specifications of uttering worthless checks by dishonorably failing to maintain sufficient funds, one specification of bigamy, and one specification of obstruction of justice, all in violation of Article 134, U.C.M.J., 10 U.S.C. § 934. Consistent with his plea, he was also found guilty of an additional specification of making a false official statement (Specification 3 of Charge I), in violation of Article 107, U.C.M.J., 10 U.S.C. § 907. He was sentenced to be discharged with a bad conduct discharge and to be reduced to the pay grade of E-1 (airman basic).

The convening authority approved the sentence as adjudged on November 20, 1996. On December 4, 1997, the Air Force Court of Criminal Appeals affirmed both the findings and sentence and thereby denied relief sought by the petitioner. (Appendix C).

On September 30, 1998, the United States Court of Appeals for the Armed Forces granted review on the following issue:

> WHETHER THE MILITARY JUDGE ERRED IN FAILING TO SUPPRESS STATEMENTS THE APPELLANT MADE TO HIS FIRST SERGEANT AFTER HAVING BEEN SUBJECTED TO REPEATED AND PERSISTENT QUESTIONING BY HIS FIRST SERGEANT WITHOUT HAVING BEEN FIRST ADVISED OF HIS RIGHTS UNDER ARTICLE 31, UCMJ.

This issue was argued before the United States Court of Appeals for the Armed Forces on March 9, 1999. The court

issued its decision on August 31, 2000, reversing the decision of the Air Force Court of Criminal Appeals as to Specification 1 of Charge I but affirming the decision as to Specification 2 of Charge I, thus denying relief to petitioner as to his conviction under Specification 2. *United States v. Swift*, 53 M.J. 439 (2000). The United States Court of Appeals for the Armed Forces affirmed the sentence without remanding the case for further proceedings. The first two questions presented in this petition are based on the issue granted by the United States Court of Appeals for the Armed Forces. The last question presented springs from the action of the United States Court of Appeals for the Armed Forces in assessing the appropriateness of the sentence in the case.

Statement of Facts:

At the time of the offenses, Staff Sergeant (SSgt) John B. Swift was a jet engine mechanic assigned to the 20th Component Repair Squadron at Shaw Air Force Base (AFB), South Carolina. (Prosecution Ex. 16). His first sergeant, Master Sergeant (MSgt) George Vernoski, had served on active duty for twenty-two years and had been a first sergeant (a senior enlisted command representative) for the last seven of those years (R. at 28).

On Friday, March 8, 1996, MSgt Vernoski learned that a Jacqueline Swift had called the squadron relating that earlier that morning a woman who identified herself as "Suzanne Swift" called her. (R. at 10). The gist of the conversation was that "Suzanne" told Jacqueline she was married to SSgt Swift and that Jacqueline was not. (R. at 10, 121). Jacqueline Swift related that Suzanne told her that she (Jacqueline) had been divorced since 1993 and that Suzanne had documentation to that effect from Pike County, Kentucky. Appellate Ex. II.

To the best of her knowledge Jacqueline Swift believed she was still married to SSgt Swift and had not been divorced. (R. at 10). Among other things, MSgt Vernoski learned that Jacqueline Swift had called the Pike County courthouse, learning that there was no record of a divorce on

file, (R. at 19, 22), and that Jacqueline Swift wanted to press charges for bigamy if SSgt Swift had in fact married a second wife. (R. at 18).

MSgt Vernoski retrieved SSgt Swift's unit mobility folder and examined his emergency data card, on which Jacqueline Swift was listed as his wife. (R. at 10). MSgt Vernoski also went to the Military Personnel Flight (MPF) to examine SSgt Swift's personnel records to see whom he claimed as his wife on his Defense Enrollment Eligibility Reporting System (DEERS)[1] enrollment form. (R. at 10, 19). He learned that a "Suzanne" Swift was listed as his wife in DEERS and that Jacqueline Swift had been disenrolled. (R. at 10-11). The MPF clerk told them that a military member could change this information by presenting a copy of a divorce decree. (R. at 11). Air Force Instruction (AFI) 36-3001, *Issuing and Controlling Identification (ID) Cards*, 01 Jan 96 (Petition for Reconsideration, Appendix), in force at the time of SSgt Swift's offenses, required an Air Force member (or "sponsor") to provide "the documentation necessary to terminate DEERS for dependents no longer eligible for benefits and privileges." *Id.* at para. 2.4.4. However, at trial, a Staff Sergeant (SSgt) Issac, testified that the documentation a "technician that works in the DEERS system would have to see, with no exceptions" to *disenroll* a former spouse would be a copy of the divorce decree. (R. at 137). Under AFI 36-3001, the only specific documentation required to be produced (but not maintained) to *enroll* a new spouse was a marriage certificate. AFI 36-3001, Table A5.1, Rule 12.

MSgt Vernoski also spoke with Major Davis, a judge advocate assigned to the Shaw AFB legal office. (R. at 19-21). Major Davis was the chief of military justice and the deputy staff judge advocate; he was the primary attorney for military justice matters. (R. at 21); Appellate Ex. I. MSgt

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[1]DEERS is the computer system that the Department of Defense uses to track persons who are eligible for military benefits. *See* AFI 36-3001, Attachment 1 (Glossary), at 36.

Vernoski's duties as first sergeant necessarily involved speaking with Major Davis. The purpose of these discussions was to keep Major Davis abreast of potential crimes in the squadron. (R. at 20). MSgt Vernoski explained SSgt Swift's situation to Major Davis. (R. at 20). He told Major Davis what he had discovered on SSgt Swift's DEERS enrollment (*i.e.*, that Jacqueline Swift, the woman claiming to still be his wife, had been disenrolled and a "Suzanne" Swift substituted in her place). (R. at 21). MSgt Vernoski spoke to Major Davis about the matter "because it was unusual." (R. at 32). He had "never seen or come across a bigamy *case*." (R. at 32) (emphasis added); *see also* (R. at 36). Major Davis, in referring to the events of Friday, March 8, 1996, wrote: "Capt Beth Myatt and MSgt Vernoski had previously mentioned the troop *and his potential bigamy to me*." Appellate Ex. I (emphasis added).

Based on the information available to MSgt Vernoski and Capt Myatt, the squadron's section commander, these two command representatives made a decision to confront SSgt Swift. (R. at 11). They decided to wait until Monday. (R. at 11). MSgt Vernoski had previously counseled SSgt Swift in fall of 1995 for failing to support his wife, Jacqueline. (R. at 27) At that time MSgt Vernoski was under the impression that SSgt Swift and Jacqueline were still married. (R. at 27-28, 124). Until Jacqueline Swift's phone call on Friday, March 8, 1996, he had not received any other information that would change his belief that they remained married. (R. at 28).

On Monday morning, March 11, 1996, Jacqueline Swift called the squadron and spoke with MSgt Vernoski directly. (R. at 11, 22). She told him about calling the Pike County courthouse (where "Suzanne" had claimed the divorce order originated) and about speaking to a clerk by the name of Montrina who was unable to locate a divorce filed on behalf of SSgt Swift. (R. at 23, 33). She gave MSgt Vernoski the clerk's telephone number in the event he wanted to speak to the clerk himself. (R. at 23). After concluding his conversation with Jacqueline Swift, MSgt Vernoski called

SSgt Swift into his office. (R. at 18). He wanted to "hear his side of the story." (R. at 34, 124). He did not advise SSgt Swift of his rights under Article 31[2]; however, before speaking with him, MSgt Vernoski researched the applicable Manual for Courts-Martial provisions concerning the offense of bigamy. (R. at 31). He considered bigamy a serious offense. (R. at 44).

SSgt Swift was told of the "allegations" Jacqueline Swift was making (R. at 12, 31). SSgt Swift denied them. (R. at 12). He stated that he divorced Jacqueline in September 1994, (R. at 31), but this conflicted with what MSgt Vernoski recalled from having counseled SSgt Swift for not supporting his wife as recently as fall 1995. (R. at 124). SSgt Swift offered by way of explanation that Jacqueline Swift "may be trying to get him in trouble." (R. at 12).

Upon hearing SSgt Swift mention the word "trouble," it occurred to MSgt Vernoski to inform SSgt Swift of the maximum punishment for the offense of bigamy. (R. at 12). He did this by reading from the Manual for Courts-Martial, which he "just happened" to have out. (R. at 12, 24). MSgt Vernoski "had the book out" because he was "curious;" he "never had a *case* like this before." (R. at 12) (emphasis added). At no time did he advise SSgt Swift of his Article 31 rights. *Id.*

According to MSgt Vernoski, the conversation about the maximum punishment for bigamy came about after SSgt

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[2]Article 31, U.C.M.J., 10 U.S.C. § 831. As noted in *Swift*:

> The primary source of the rights' warning requirements in military law is a statutory enactment, not constitutional adjudication. Congress has provided members of the armed forces with a rights' warning requirement that is broader than the warnings required in a civilian setting as a matter of constitutional law under *Miranda*. Article 31(b) mandates rights' warnings for anyone "suspected of an offense," whereas *Miranda* warnings are required only in circumstances amounting to "custodial interrogation."

53 M.J. at 445. In 1967, the United States Court of Military Appeals held that the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), apply to custodial interrogations in the armed forces. *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

Swift told him that Jacqueline may be trying to get him into trouble, "big trouble." (R. at 39). MSgt Vernoski responded, "Yeah, well she can get you in trouble, she can get you...[two years in jail]." (R. at 39). On cross-examination, the following exchange took place between trial defense counsel and MSgt Vernoski:

> Q: Okay. You go back to your office and before you talked to Sergeant Swift, before you called him into your office, you pull out a copy of the Manual for Courts-Martial, correct?
>
> A: Yes, sir.
>
> Q: And you look up bigamy?
>
> A: I did.
>
> Q: Why did you look up bigamy if you didn't consider him a suspect?
>
> A: Because I've never had an incident like this in the years I've been a first sergeant, and *I was just curious on what the elements were* and—

(R. at 24) (emphasis added).

The conversation continued without SSgt Swift being advised of his Article 31 rights. MSgt Vernoski reminded SSgt Swift about a conversation they had in October 1995 at which time SSgt Swift stated he was still married. (R. at 12). SSgt Swift said he didn't remember making that statement. (R. at 12). MSgt Vernoski requested that SSgt Swift provide him a copy of the divorce decree. (R. at 12). He responded that on the advice of his attorney he did not want Jacqueline to have a copy of the divorce paperwork because it would give her an advantage in a child custody matter. (R. at 12, 124-5). SSgt Swift told MSgt Vernoski he'd provide a copy of the divorce decree first thing the next morning. (R. at 12). MSgt Vernoski directed SSgt Swift to meet with him "first thing in the morning." (R. at 12-13).

After this conversation, MSgt Vernoski again went to the Shaw AFB legal office. (R. at 24). His purpose was to keep the legal office informed about the case: "I told Major

Davis about this case because I normally keep him in the loop regarding 'potential crimes' in the squadron." Appellate Ex. III. He told Major Davis about the conversation he had just had with SSgt Swift. (R. at 24).

The next morning, Tuesday, March 12, SSgt Swift did not appear at 0730 hours as directed, and MSgt Vernoski called SSgt Swift's duty section to inquire into his whereabouts. (R. at 13). Around 0800 hours, SSgt Swift arrived at MSgt Vernoski's office without the paperwork he had told MSgt Vernoski he would bring. (R. at 13). Again, MSgt Vernoski did not advise SSgt Swift of his Article 31 rights. SSgt Swift told MSgt Vernoski that his attorney would probably fax his divorce decree to the squadron by 0900 hours, but definitely no later than lunchtime. (R. at 13).

Later Tuesday afternoon, SSgt Swift again met with MSgt Vernoski. (R. at 13). Once again, MSgt Vernoski did not advise SSgt Swift of his Article 31 rights. SSgt Swift presented MSgt Vernoski with documents that appeared to MSgt Vernoski to be child custody paperwork. *Id.* He told SSgt Swift, "[t]his is not a divorce decree," and told SSgt Swift that he needed to see a *divorce* decree. *Id.* SSgt Swift said he should have a copy by first thing in the morning. *Id.* SSgt Swift was supposed to return to MSgt Vernoski's office at 0730 hours the next morning. *Id.*

The next morning, Wednesday, March 13th, SSgt Swift again failed to report at 0730 hours. (R. at 13). Around 0830 hours, MSgt Vernoski called SSgt Swift and told him to come to his office. *Id.* SSgt Swift was not advised of his Article 31 rights. Once again, he arrived without the paperwork he promised he'd bring. *Id.* He told MSgt Vernoski his attorney didn't start work until 0900 and he couldn't reach him until then. *Id.* MSgt Vernoski then told SSgt Swift he "was tired of him not coming at the designated time" and that he was tired of "having. . . to go get him all the time." (R. at 14). He told SSgt Swift he "*wanted hourly updates*. . . whether he knew something or not, just so he could be in contact. . . and keep his appointments." *Id.* (emphasis added).

Later that morning, MSgt Vernoski again met with SSgt Swift, and again, he did not advise SSgt Swift of his Article 31 rights. (R. at 14). SSgt Swift told him he had tried to contact his attorney, but he was in court and could not be reached. MSgt Vernoski asked SSgt Swift why he couldn't go to his attorney's office. SSgt Swift told him that the paralegal there could not release the document without his attorney's consent. (R. at 14). The colloquy between MSgt Vernoski and trial counsel reveals what happened next:

Q: So what did the two of you agree on at that point?

A: Okay, at that point, *he was going to go down to the attorney's office, whether or not he heard back from the attorney, whether or not he had answered his page, and see about getting a copy.*

Q: Okay, so what happened next?

A: Okay, around ten o'clock, I believe it was, he said he had contacted the attorney, the attorney had answered the page and had authorized the clerk to give him a copy of the divorce paperwork. And I told him at that time, "Well, great, but don't hurry because I'm going to be out of the office for a while. Just drop the paperwork off around a quarter to two or so, right before our two o'clock staff meeting."

Q: And did you see him later that afternoon?

A: Yes, he showed up at a quarter to two with a divorce decree.

(R. at 14-15) (emphasis added).

SSgt Swift produced paperwork that he told MSgt Vernoski was his divorce decree. (R. at 16). At trial the "decree" was admitted against SSgt Swift. Prosecution Ex. 3. At no time during the seven-day period beginning Friday, March 8, 1996, and ending Thursday, March 14, 1996, did MSgt Vernoski ever advise SSgt Swift of his rights under Article 31. At the investigatory hearing held pursuant to Article 32, U.C.M.J., 10 U.S.C. § 832, and again at trial, MSgt Vernoski maintained that he never suspected SSgt Swift of

an offense. (R. at 17). In his seven years as a first sergeant, he estimated he's read members their rights hundreds of times. (R. at 28).

At trial, SSgt Swift's defense counsel moved to suppress all statements made to MSgt Vernoski, and all evidence derived therefrom, including Prosecution Exhibit 3, on the grounds that the statements were taken in violation of SSgt Swift's rights under Article 31, U.C.M.J. (R. at 8); Appellate Ex. I. The military judge denied the motion. (R. at 52-54). Trial defense counsel again raised this issue to the convening authority in a brief filed under Article 38(c), U.C.M.J., 10 U.S.C. § 838(c).

REASON FOR GRANTING THE PETITION

I.

The Fifth Amendment to the Constitution protects a person from being "compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. This Court has held that this protection is limited to "compelled incriminating communications . . . that are testimonial in nature." *United States v. Hubbell*, 530 U.S. 27, ___, 120 S.Ct. 2037, 2042 (2000). However, this Court in *Hubbell* did not reach the issue of whether this limitation was correctly decided in *Fisher v. United States*, 425 U.S. 391 (1976). *See Hubbell*, 120 S.Ct. at 2053-54 (Thomas, J., concurring) (noting that *Fisher* departed from the historical and constitutional context surrounding the Fifth Amendment). Justice Thomas in his concurrence noted that this limitation to communications that are testimonial in nature requires "a difficult parsing of the act of responding to a subpoena *duces tecum*." *Id.*, 120 S.Ct. at 2054.

Likewise, this limitation also requires "a difficult parsing of the act of responding" to an order of a military superior. For SSgt Swift, he was faced with a dilemma: provide the fake divorce decree and thereby make a false official statement (his ultimate path) or not provide the divorce decree and thereby fail to obey the order of a

superior noncommissioned officer, an offense punishable by confinement for one year. Article 91(2), U.C.M.J., 10 U.S.C. § 891(2); *see also Swift*, 53 M.J. at 445. Moreover, he was not in the more enviable position of a person responding to a subpoena duces tecum because he could not ask a court to quash MSgt Vernoski's order.

In its opinion in this case, the United States Court of Appeals for the Armed Forces held that because MSgt Vernoski was acting in a disciplinary capacity, he was required to advise SSgt Swift of his rights under Article 31, U.C.M.J., 10 U.S.C. § 831, and the Court also held that there is no exception to the requirements of Article 31 for false statement prosecutions under Article 107, U.C.M.J., 10 U.S.C. § 907. *Swift*, 53 M.J. 439 (2000). However, the court declined to apply this privilege to the production of the divorce decree, reasoning that the "appellant could not have objected to producing the divorce decree solely on the basis that the fraudulent contents were incriminating because MSgt Vernoski's request was based on facts indicating the document, the divorce decree, had been created prior to the order to produce it," citing *Fisher v. United States*, 425 U.S. 391 (1976), as authority. *Id.* at 453. This holding appears to based on an earlier discussion of the law in the opinion, when the court noted that

> The contents of documents voluntarily prepared before the compelled production are not protected by the Fifth Amendment or Article 31(a) because the documents "could not be 'said to contain compelled testimonial evidence.'"

53 M.J. at 453 (citations omitted). In other words, because the contents of the divorce decree were voluntarily produced earlier, the court concluded that the subsequent, compelled act of production by SSgt Swift had no testimonial aspect.

However, this Court's opinion in *Hubbell* makes it clear that the analysis does not end there; an act of production of previously prepared documents may still be testimonial in nature. 120 S.Ct. at 2047. This is particularly true in a case such as this where the act of production was used as the basis

for a conviction. Using the analysis in *Fisher* would be appropriate in analyzing the effect of the decree on the bigamy prosecution because any testimonial significance would relate to a crime that had already occurred. Here the crime was in progress or really had yet to occur, and the act of production itself was the *only* incriminating evidence. Because Article 107, U.C.M.J., 10 U.S.C. § 907, requires that a statement be made with the intent to deceive, *id.*, it then requires a testimonial aspect because one can only deceive via an act of production by making some sort of false factual assertion along with the act of production.

Because SSgt Swift's act of production carried with it an intent to deceive, then that act of production would communicate a factual assertion (i.e., this false divorce decree is a legitimate divorce decree), and as a result it would be privileged under the Fifth Amendment and under Article 31. *Hubbell*, 120 S.Ct. at 2043-44; *see also Doe v. United States*, 487 U.S. 201, 210 (1988) (for a communication to be testimonial, it "must itself, explicitly or implicitly, relate a factual assertion or disclose information."). Finally, should this Honorable Court not agree that his act of production is testimonial under *Fisher* and *Hubbell*, SSgt Swift asks that this Honorable Court overrule *Fisher* to the extent that it holds that the Fifth Amendment does not protect him from being compelled to produce private papers in his personal possession.

II.

In making its decision, should this Honorable Court now conclude SSgt Swift's act of production was indeed testimonial in nature, SSgt Swift respectfully contends that United States Court of Appeals for the Armed Forces has misapprehended the scope of the required records exception to the Fifth Amendment and has expanded it beyond its traditional bounds. In its opinion, the court below decided that SSgt Swift's production fell within the required-records exception to the Fifth Amendment and to Article 31(a). *Swift*, 53 M.J. at 454. The court explained the test for the required-records exception as follows:

> To constitute "required records," the documents must satisfy the following test: (1) the requirement that they be kept "must be essentially regulatory"; (2) the records must be the "kind which the regulated party has customarily kept"; and (3) the records themselves must be either public documents or "have assumed 'public aspects' which render them at least analogous to public documents."

Id. at 453 (citing *Grosso v. United States*, 390 U.S. 62, 67-68 (1968) and *In re Dr John Doe*, 711 F. 2d 1187 (2d Cir. 1983)).

In addition to *Grosso* and *In re Dr. John Doe*, the opinion also cited *United States v. Shapiro*, 335 U.S. 1 (1948), in examining whether SSgt Swift's act of production fell within the required records exception. *Shapiro* dealt with the production of records that were required to be maintained by Section 14 of Maximum Price Regulation 426, 8 Fed.Reg. 9546 (1943), which required that "[e]very person subject to this regulation shall . . . preserve for examination" their records. *Shapiro*, 335 U.S. at 5 n.3. Contrast that regulatory scheme where records must be preserved for examination with the regulatory scheme that did *not* require SSgt Swift to maintain a personal copy of a divorce decree. He had no requirement to *maintain* any document once it was presented to personnel officials to change his spousal enrollment in DEERS; he could have thrown the divorce decree away had he wanted. AFI 36-3001 required a sponsor to provide "the documentation necessary to terminate DEERS for dependents no longer eligible for benefits and privileges." *Id.* at para. 2.4.4. At trial, Staff Sergeant (SSgt) Issac testified that the documentation a "technician that works in the DEERS system would have to see, with no exceptions" to *disenroll* a former spouse would be a copy of the divorce decree. (R. at 137). The only specific documentation required to be produced (not maintained) to *enroll* a new spouse was a marriage certificate. AFI 36-3001, Table A5.1, Rule 12.

The language of AFI 36-3001 makes it clear that the divorce decree was never required to be specifically produced

nor was any documentation whatsoever required to be maintained. The regulation only requires the production of "documentation" in a generic sense. Any production of the divorce decree to a DEERS technician was merely the result of a usual or local practice that was not specifically mandated in the regulation. There was no *regulatory* requirement that SSgt Swift keep or even produce the divorce decree. This is not an instance where the "incriminating evidence [is] the byproduct of obedience to a regulatory requirement, such as . . . ***maintaining*** required records" causing it to be devoid of any testimonial privilege. *Hubbell*, 120 S.Ct. at 2043 (citing *Shapiro v. United States*, 335 U.S. 1 (1948)) (emphasis added).

Counsel for petitioner is unaware of any other federal courts which have squarely addressed the question of whether the required-records exception applies not only to records required to be maintained but also to those required to have been produced in the past. *In re Dr. John Doe*, 711 F.2d 1187 (2d Cir. 1983), is a case where the facts hint at the presence of the issue but contains no discussion of it. However, the documents at issue in *In re Dr. John Doe* were tax records, specifically W-2 forms. Even if the United States Court of Appeals for the Second Circuit did not specifically note so in its opinion, tax records are more thoroughly regulated and were indeed required to be kept in that case. *See* 26 U.S.C. § 6001 *and* IRS Income Tax Records Rule, 26 C.F.R. 1.6001-1 (1982). Moreover, *In re Dr. John Doe* involved a regulatory requirement for a specific kind of documentation, the W-2 form, 711 F.2d at 1191, specificity that is lacking in this case.

Even if *In re Dr. John Doe* does stand for the proposition that the required-records exception applies to records required to be produced at any moment of time, even a moment of time in the past, then the *In re Dr. John Doe* and *Swift* courts stand alone in this unwarranted expansion of the required-records exception, and those courts have decided an important federal question in a way that conflicts with decisions of this Honorable Court. This Honorable Court discussed the nature of the required-records exception at

length in *Baltimore City Dept. of Social Services v. Bouknight*, 493 U.S. 549 (1990):

> In *Shapiro v. United States*, the Court considered an application of the Emergency Price Control Act and a regulation issued thereunder which *required licensed businesses to maintain records and make them available for inspection* by administrators.
>
> The Court indicated that no Fifth Amendment protection attached to production of the "required records," which the " 'defendant was *required to keep*, not for his private uses, but *for the benefit of the public, and for public inspection.*'" The Court's discussion of the constitutional implications of the scheme focused upon the relation between the Government's regulatory objectives and the Government's interest in gaining access to the records in Shapiro's possession:
>
> > It may be assumed at the outset that there are limits which the Government cannot constitutionally exceed in *requiring the keeping of records* which may be *inspected* by an administrative agency and may be used in prosecuting statutory violations committed by the recordkeeper himself.
> >
> > But no serious misgiving that those bounds have been overstepped would appear to be evoked when there is a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally *require the keeping of particular records, subject to inspection* by the Administrator."
>
> . . .
>
> In *Wilson v. United States*, the Court surveyed a range of cases involving the custody of public documents and records *required by law to be kept* because they related

> to "the appropriate subjects of governmental regulation and the enforcement of restrictions validly established."

Id.. at 556-558 (citations omitted) (emphases added). Thus, it is clear that when this Honorable Court has applied the required-records exception, it has only been in the context of a regulatory requirement to maintain records.

Moreover, SSgt Swift's situation is unlike the situation in Bouknight where *Bouknight* "ha[d] accepted the incident obligation to permit inspection" of her son and his condition when she agreed to extensive conditions of a court-approved protective supervision order allowing her to continue custody of her previously-abused son. *Id.* at 559. The extent of the Air Force's regulatory scheme was to require SSgt Swift to produce at a given instant in time (in this case in the past) necessary, yet unspecified, documentation. It did not require the keeping of the record or the production for inspection of the record that would permit the application of the required-records exception.

A divorce decree then was not a record required by regulation or statute to be maintained or "kept" by SSgt Swift, and the required-records exception to the Fifth Amendment and to Article 31(a), U.C.M.J., thus does not apply to his act of producing it.

III.

Article 67(c), UCMJ, 10 U.S.C. § 867(c), limits the ability of the United States Court of Appeals for the Armed Forces to "take action only with respect to matters of law." *Id.* The Court of Appeals for the Armed Forces *sub silentio* assessed the appropriateness of the sentence in this case after setting aside the conviction in part: "In light of the remaining offenses and the evidence in this case, we are convinced beyond a reasonable doubt that the error with respect to the dismissed offense was not prejudicial as to sentence." *Swift*, 53 M.J. at 455. However, just such a practice was condemned in *United States v. Christopher*, 32 C.M.R. 231 (1962):

> We hasten to emphasize that we should not be considered as arrogating to ourselves, under the guise of a legal label, the power to determine or pass on factual questions of sentence appropriateness. Such is not our intention. Quite clearly, and not inadvisedly, Congress denied this Court such authority under the Uniform Code of Military Justice.

Id. at 236; *see also, e.g., United States v. Dukes*, 5 M.J. 71, 72-73 (C.M.A. 1978). Such a determination is a fact-based decision that must remain vested in the discretion of a trial court or of a court of appeals with fact-finding powers such as those provided to the service courts of criminal appeals under Article 66, U.C.M.J., 10 U.S.C. § 866. *Cf. United States v. Pimienta-Redondo*, 874 F.2d 9, 14 (1st Cir.) (*en banc*) ("After an appellate court unwraps the package and removes one or more charges from its confines, the sentencing judge, herself, is in the best position to assess the effect of the withdrawal and to redefine the package's size and shape (if, indeed, redefinition seems appropriate)"), *cert. denied*, 493 U.S. 890 (1989). Petitioner, therefore, asks this Honorable Court to exercise its supervisory authority to correct this act which exceeded the authority of the Court of Appeals for the Armed Forces.

CONCLUSION

The decision of the United States Court of Appeals for the Armed Forces represents a significant departure from this Honorable Court's Fifth Amendment jurisprudence. Moreover, the United States Court of Appeals for the Armed Forces has so far departed from the accepted and usual course of judicial proceedings by assessing petitioner's sentence as to call for an exercise of this Honorable Court's supervisory power. Therefore, the petitioner respectfully requests that this Honorable Court grant certiorari to the United States Court of Appeals for the Armed Forces.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 2000

APPENDIX A

UNITED STATES, Appellee,

v.

John B. SWIFT, Staff Sergeant,
U.S. Air Force, Appellant

No. 98-5012
Crim. App. No. 32447

United States Court of Appeals for
the Armed Forces

Argued March 9, 1999.*

Decided August 31, 2000.

EFFRON, J., delivered the opinion of the Court, in which CRAWFORD, C.J., GIERKE, J., and COX, S.J., joined. SULLIVAN, J., filed an opinion concurring in part and dissenting in part.

For Appellant: *Captain Michael J. Apol* (argued); *Colonel Douglas H. Kohrt* (on brief); *Lieutenant Colonel Kim L. Sheffield.*

For Appellee: *Captain Steven D. Dubriske* (argued); *Colonel Anthony P. Dattilo* and *Major Ronald A. Rodgers* (on brief); *Lieutenant Colonel Michael J. Breslin.*

Judge EFFRON delivered the opinion of the Court.

A general court-martial composed of officer members convicted appellant, pursuant to mixed pleas, of making a false official statement (3 specifications), writing bad checks (2 specifications), bigamy, and impeding an investigation, in violation of Articles 107 and 134, Uniform Code of Military Justice, 10 USC §§ 907 and 934, respectively. Appellant was sentenced to a bad-conduct discharge and reduction to the grade of E-1. The convening authority approved the sentence

*This case was argued at the United States Air Force Academy, Colorado Springs, Colorado, as part of Project Outreach. *See United States v. Martinez*, 52 MJ 22, 23 n. * (1999).

as adjudged. In an unpublished opinion, the Court of Criminal Appeals affirmed the findings and sentence but ordered that appellant receive administrative relief from the improper execution of the adjudged reduction in grade.

On appellant's cross-petition, we granted review of the following issue:

> WHETHER THE MILITARY JUDGE ERRED IN FAILING TO SUPPRESS STATEMENTS APPELLANT MADE TO HIS FIRST SERGEANT AFTER HAVING BEEN SUBJECTED TO REPEATED AND PERSISTENT QUESTIONING BY HIS FIRST SERGEANT WITHOUT HAVING BEEN FIRST ADVISED OF HIS RIGHTS UNDER ARTICLE 31, UCMJ.[1]

We hold that the military judge erred in admitting the verbal statements at issue in the absence of rights' warnings under Article 31(b), UCMJ, 10 USC § 831(b), but did not err in admitting the divorce decree into evidence. The error was prejudicial as to one specification on findings, but harmless as to the sentence. *See* Art. 59(a), UCMJ, 10 USC § 859(a).

I. FACTS

A. *Questions Concerning Appellant's Marital Status*

On Friday, March 8, 1996, appellant's commander, Captain (Capt) Myatt, received a telephone call from a woman who identified herself as appellant's wife, JS (hereafter referred to as "the first Mrs. Swift"). The first Mrs. Swift stated that she had received a telephone call that morning from a woman who had identified herself as SS (hereafter referred to as "the second Mrs. Swift"). According to the first Mrs. Swift, the second Mrs. Swift had made the following points during their telephone conversation: (1) the second Mrs. Swift currently was married to appellant; (2) the first Mrs. Swift no longer was

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[1]The initial filing in our Court, which concerned an unrelated issue certified by the Judge Advocate General under Article 67(a)(2), UCMJ, 10 USC § 867(a)(2)(1989), was disposed of by order on September 30, 1998. 50 MJ 351.

married to appellant; (3) appellant had divorced the first Mrs. Swift in 1994; (4) the divorce took place in Pike County, Kentucky; and (5) the divorce papers were in the possession of the second Mrs. Swift.

The first Mrs. Swift told Capt Myatt that she had no previous knowledge of either the second Mrs. Swift or a divorce. The first Mrs. Swift added that to the best of her knowledge, she was still married to appellant and had not been divorced. She told Capt Myatt that after her telephone conversation with the second Mrs. Swift, she contacted the Pike County courthouse, and a clerk had told her there was no record of such a divorce on file in that county.

The first Mrs. Swift and appellant had been living apart for some time. She told Capt Myatt that she did not believe she was divorced since she had not received any notice that appellant was seeking a divorce and had not signed any paperwork. She asked Capt Myatt for assistance in determining whether there had been a divorce and whether she remained eligible for military medical care. The first Mrs. Swift concluded her conversation with Capt Myatt by telling her that, *if* appellant had married the second Mrs. Swift without first obtaining a divorce, she wanted to press charges for the offense of bigamy.

Capt Myatt related this information to appellant's first sergeant, Master Sergeant (MSgt) Vernoski. MSgt Vernoski was familiar with appellant's marriage to the first Mrs. Swift because, in the fall of 1995, MSgt Vernoski had counseled appellant for failing to support his wife, the first Mrs. Swift. At that time, MSgt Vernoski assisted appellant in setting up an allotment for the first Mrs. Swift. Until learning of the phone call to Capt Myatt, MSgt Vernoski was under the impression that the first Mrs. Swift and appellant remained married.

Capt Myatt and MSgt Vernoski reviewed appellant's emergency data card in the unit mobility folder, which still listed the first Mrs. Swift as appellant's wife. Capt Myatt and MSgt Vernoski then went to the personnel office to check appellant's records. Appellant's file included several copies of DD Form 1172, the form used to enroll or disenroll military members and

dependents from the Defense Eligibility Enrollment Reporting System (DEERS) for purposes of health care eligibility. According to these records, appellant had disenrolled the first Mrs. Swift and had enrolled the second Mrs. Swift as his spouse. The form indicated that the first Mrs. Swift became ineligible for benefits on September 14, 1994. An official at the personnel office advised Myatt and Vernoski that a spouse could be disenrolled only if the servicemember provided a copy of a divorce decree. The personnel official noted that appellant's emergency data card in the personnel office still listed the first Mrs. Swift as appellant's spouse, but she also recalled that appellant was in the process of revising that card.

Shortly thereafter, Capt Myatt and MSgt Vernoski visited the base legal office, where they discussed several military justice matters with the chief of military justice. During this visit, MSgt Vernoski described the phone call from the first Mrs. Swift and related what they had learned at the personnel office. MSgt Vernoski later testified that he had brought this matter to the attention of the chief of military justice "because it was unusual" and he had "never seen or come across a bigamy case." The chief of military justice recalled that MSgt Vernoski and Capt Myatt mentioned, during this meeting, "the troop and his potential bigamy to me." Later in the day, Capt Myatt and MSgt Vernoski decided that they would confront appellant Monday morning.

On Monday, March 11, before they confronted appellant, MSgt Vernoski received a call from the first Mrs. Swift. She reiterated what she previously had told Capt Myatt and gave MSgt Vernoski the name and telephone number of the clerk in the Pike County courthouse with whom she had spoken. According to the first Mrs. Swift, she told MSgt Vernoski that she did not "think there was a divorce" and added that she "didn't think it was legal." MSgt Vernoski testified that he had never heard of anyone being divorced without that person's knowledge, but thought that it could be possible. After the phone call from the first Mrs. Swift and prior to meeting with appellant, MSgt Vernoski opened the Manual for Courts-Martial and reviewed the Manual's provisions concerning the offense of bigamy, including the elements and the maximum punishment. According to MSgt

Vernoski, he looked at the Manual because he was "curious," as he had never had a "case like this before."

MSgt Vernoski, who subsequently testified that he had called appellant into his office to "hear his side of the story," did not advise appellant of the right to remain silent or the other self-incrimination rights under Article 31(b). He told appellant of the "accusations" made by the first Mrs. Swift. Appellant responded that he had divorced the first Mrs. Swift in September 1994. Immediately upon hearing appellant state that he had been divorced in 1994, MSgt Vernoski reminded appellant that in the fall of 1995, just a few months earlier, appellant had stated that he still was married to the first Mrs. Swift. Appellant responded by claiming that he had not made such a statement.

Appellant then provided MSgt Vernoski with the name of an attorney who, according to appellant, had represented him in the divorce proceeding. Appellant also suggested that the first Mrs. Swift might be trying to get him into trouble. MSgt Vernoski responded by telling appellant that "she can get you in trouble" and showed him the maximum punishment for bigamy from the Manual for Courts-Martial.

At the conclusion of the conversation, MSgt Vernoski directed appellant to provide him with a copy of his divorce decree. Appellant said that he would bring a copy the next morning. Later that day, MSgt Vernoski visited the chief of military justice at the base legal office and told him about his conversation with appellant. He later noted that he had visited the chief of military justice on this matter "because I normally keep him in the loop regarding 'potential crimes' in the squadron."

B. *Production of the Divorce Decree*

When appellant failed to appear with the divorce decree on Tuesday morning, MSgt Vernoski summoned him. Appellant arrived without the paperwork, explaining that his attorney, who was in court that morning, would fax a copy of the decree to the squadron later in the day.

On Tuesday afternoon, appellant delivered certain documents to MSgt Vernoski, who determined that the documents were not responsive because they pertained to child custody rather than divorce. He told appellant that he needed to see a divorce decree to verify his divorce, and appellant promised to deliver the divorce decree at 0730 hours the following morning.

The next day, appellant again failed to report to MSgt Vernoski's office. When summoned, appellant arrived without the paperwork, explaining that his attorney did not open his office until 9:00 a.m. MSgt Vernoski directed appellant to report to him every hour until he produced the divorce papers. Just before 2:00 p.m., Wednesday, March 13, 1996, appellant delivered a document to MSgt Vernoski that he described as his divorce decree. A cover letter and a page of the document were missing from the document, and appellant promised to deliver the missing items the next morning. After this meeting, MSgt Vernoski did not discuss the matter again with appellant. Appellant never produced the missing papers.

The document appeared to be unusual to MSgt Vernoski, so he took it to the chief of military justice because "[he] wasn't sure if it was legal" and wanted "to have it checked out." Together, MSgt Vernoski and the chief of military justice examined the document. The first thing that struck them as unusual was that the first Mrs. Swift had not signed the document. After further review, they also noticed several misspellings and typographical errors. The document was purportedly signed by a Circuit Court Judge in Pike County and filed at the Pike County Courthouse. The document indicated that it had been filed on September 14, 1994, the same date listed on the DEERS form. With MSgt Vernoski in the office, the chief of military justice called the civilian attorney identified by appellant as his attorney in the divorce proceedings. The attorney responded that, although he had represented appellant in a child-custody case, he had not represented him in a divorce action.

The following morning, the chief of military justice called the Pike County Courthouse to verify whether the divorce

decree had been filed at the court. The Deputy Clerk of the Court informed him that the document had not been filed with that court or signed by anyone sitting as a Circuit Court Judge in Pike County. That same day, the second Mrs. Swift brought MSgt Vernoski a copy of what she believed was appellant's divorce decree from the first Mrs. Swift. The document was identical to what appellant had provided him the previous day.

Soon thereafter, appellant was charged with a number of offenses, including: (1) that he made false official statements between March 11 and 13, 1996, when he said that he was divorced and that the named civilian attorney represented him in that action; (2) that he made a false official statement when he presented a false divorce decree to MSgt Vernoski on Wednesday, March 13, 1996; (3) that he committed obstruction of justice by impeding MSgt Vernoski's investigation by presenting a false divorce decree to MSgt Vernoski; and (4) that he committed bigamy.

C. *The Motion to Suppress*

At trial, appellant moved to suppress all statements he had made to MSgt Vernoski and all evidence derived therefrom, including the purported divorce papers that appellant had given to MSgt Vernoski. The motion alleged a failure to give warnings under Article 31(b). Defense counsel indicated that the motion, if granted, would require dismissal of the two false official statement specifications and the bigamy charge. The defense did not tie the motion to the obstruction of justice charge and has not done so on appeal.

The military judge denied the motion to suppress. He concluded that "there were insufficient circumstances that caused or reasonably should have caused Sergeant Vernoski to suspect the accused of the criminal offense of bigamy." With respect to the false official statement charges, he also concluded that "there was no evidence made known to Sergeant Vernoski that reasonably should have caused him to suspect that the accused was possibly going to commit other offenses under the UCMJ in the course of producing the divorce decree."

D. *The Charge of Impeding MSgt Vernoski's Investigation*

The Government charged appellant with obstruction of justice for wrongfully endeavoring to impede an investigation into his marital status by giving MSgt Vernoski a document purporting to be a divorce decree from the first Mrs. Swift, which he knew to be false. At trial, the Government's theory was that appellant's "submi[ssion of] this phony divorce decree [was] just part and parcel of the impeding an investigation charge. . . . He provided it in the hopes that Vernoski would be satisfied with it, and nothing further would happen to him." Trial counsel maintained that "[appellant] did all these series of lies in hopes of misleading Vernoski, in misdirecting him so that it would take the pressure off of him, so that he wouldn't get in any trouble." Trial counsel further argued that appellant's conduct was "prejudicial to good order and discipline" because of the "way the military justice system works, and the way our disciplinary system works in the military, and the role and duty of the first sergeant. When he lies to his first sergeant, that has a direct impact on good order and discipline in a unit."

With regard to the obstruction of justice charge, the military judge instructed the members that they must find that appellant presented a false document to MSgt Vernoski, in a case against himself, against whom he had reason to believe that there were or would be criminal proceedings pending, with the intent to impede the due administration of justice. The military judge also informed the members that the charged misconduct must be prejudicial to good order and discipline in the armed forces.

II. DISCUSSION

A. *General Principles Concerning the Rights' Warning Requirement*

Article 31(a) of the Uniform Code of Military Justice provides that a person subject to the Code may not "compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him." Article

31(b) implements the privilege against self-incrimination through a rights' warning requirement, providing that no person subject to the Code may

> interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

Congress established this statutory warning requirement in the aftermath of World War II, long before the Supreme Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), mandated rights' warnings in civilian society. *Miranda* specifically cited Article 31 as a precedent for requiring warning persons of the privilege against self-incrimination. *Id.* at 489, 86 S.Ct. 1602.

The rights' warning requirements under Miranda represent judicially created, constitutionally based guidelines designed to protect the privilege against self-incrimination. *See Dickerson v. United States*, ___ U.S. ___, ___, 120 S.Ct. 2326, 2334 (2000). As the product of constitutional adjudication, these guidelines are not "immutable," but are subject to such modifications and exceptions as the judiciary may deem necessary or appropriate in the course of litigation. *See id.* at 2335.

The primary source of the rights' warning requirements in military law is a statutory enactment, not constitutional adjudication. Congress has provided members of the armed forces with a rights' warning requirement that is broader than the warnings required in a civilian setting as a matter of constitutional law under *Miranda*. Article 31(b) mandates rights' warnings for anyone "suspected of an offense," whereas *Miranda* warnings are required only in circumstances amounting to "custodial interrogation." *Compare* 10 USC § 831(b) *with* 384 U.S. at 498. In addition, Congress has expressly provided in Article 31(d) that "[n]o statement

obtained from any person in violation of this article . . . may be received in evidence against him in a trial by court-martial." *See* Part IID, *infra*. The broad application of the warning requirement under Article 31 to all suspects, not just those who are in custody, and the statutory restriction on admissibility of unwarned statements reflect a decision by the post-World War II Congress—which included many veterans familiar with the military justice system and its relationship to military missions and operational requirements—that the unique circumstances of military service required specific statutory protections for members of the armed forces. *See* Pub. L. No. 81-506, Ch. 169, § 1 (Art. 31), 64 Stat. 118 (1950); *cf.* Hearings on H.R. 2498 Before a Subcomm. of the House Armed Services Comm., 81st Cong., 1st Sess. 984 (1949).

In the armed forces, a person learns from the outset of recruit training to respond promptly to the direct orders and the indirect expectations of superiors and others, such as military police, who are authorized to obtain official information. Failure to respond to direct orders can result in criminal offenses unknown in civilian life, *see, e.g.*, Arts. 90 and 91, UCMJ, 10 USC §§ 890 and 891, respectively. Failure to respond to the expectations of military life can lead to charges of dereliction of duty, *see, e.g.*, Art. 92, UCMJ, 10 USC § 892, as well as serious administrative consequences, *see, e.g.*, Department of Defense (DoD) Directive 1332.14 Enlisted Administrative Separations (1993).

In such an environment, a question from a superior or an investigator is likely to trigger a direct response without any consideration of the privilege against self-incrimination. The Article 31(b) warning requirement provides members of the armed forces with statutory assurance that the standard military requirement for a full and complete response to a superior's inquiry does not apply in a situation when the privilege against self-incrimination may be invoked. *See United States v. Gibson*, 3 USCMA 746, 752, 14 CMR 164, 170 (1954).

Another special feature of military life is the blending of both administrative and law enforcement roles in the

performance of official duties. Officers, and non-commissioned officers (NCOs) in particular, have broad responsibility not only for the accomplishment of specific missions, but also for the health, welfare, morale, good order, and discipline of their subordinates. As a result, a servicemember may perceive that a question from an officer or NCO is being asked for administrative purposes, although the purpose actually may be to acquire information for use in disciplinary proceedings. As one commentator has noted:

> [M]ilitary suspects may know in a general sense that they have a right to remain silent, and they may know the consequences of waiving that right, but they may not be aware that they face adversarial situations where they may want to exercise that right. For example, a suspect may believe that a platoon sergeant is inquiring about personal finances to help the suspect balance a bank account. The suspect does not realize that the sergeant is asking the questions in a law enforcement capacity, to get evidence against the soldier for later use at a court-martial.

Supervielle, *Article 31(b): Who Should Be Required to Give Warnings?*, 123 Mil. L. Rev. 151, 187 (1989).

Our case law has interpreted Article 31 in a manner that recognizes the difference between questioning focused on the accomplishment of a military mission, including an administrative function, and questioning to elicit information for use in disciplinary proceedings. *See, e.g., United States v. Brown*, 40 MJ 152, 154 (CMA 1994); *United States v. Shepard*, 38 MJ 408 (CMA 1993). In some circumstances, there is likely to be a mixed purpose, and the matter must be resolved on a case-by-case basis.

In general, we have held that Article 31(b) requires rights' warnings if: (1) the person being interrogated is a suspect at the time of the questioning, and (2) the person conducting the questioning is participating in an official law enforcement or disciplinary investigation or inquiry. *See United States v. Moses*, 45 MJ 132, 134 (1996). Whether a person is a suspect is

an objective question that "is answered by considering all the facts and circumstances at the time of the interview to determine whether the military questioner believed or reasonably should have believed that the servicemember committed an offense." *United States v. Good*, 32 MJ 105, 108 (CMA 1991). Whether the questioning was part of a law enforcement or disciplinary investigation "is determined by assessing all the facts and circumstances at the time of the interview to determine whether the military questioner was acting or could reasonably be considered to be acting in an official law-enforcement or disciplinary capacity." *Id.; accord United States v. Davis*, 36 MJ 337, 340 (CMA 1993), *aff'd on other grounds*, 512 U.S. 452, 114 S.Ct. 2350 (1994). Questioning by a military superior in the immediate chain of command "will normally be presumed to be for disciplinary purposes." *Good*, 32 MJ at 108; *see also United States v. Loukas*, 29 MJ 385, 389 n.* (CMA 1990). The presumption is not conclusive. *See United States v. Pittman*, 36 MJ 404, 407 n.7 (CMA 1993). When there is a motion to suppress a statement on the ground that rights' warnings were not given, we review the military judge's findings of fact on a clearly-erroneous standard, and we review conclusions of law *de novo*. *United States v. Ayala*, 43 MJ 296, 298 (1995); *Moses, supra* at 135.

B. *Appellant's Status As A Suspect*

Military pay and benefits are closely tied to marital status and the status of dependents. *See, e.g.*, 10 USC §§ 1076, 1077, and 1079; 37 USC §§ 401, 403, 406, and 407. officers and NCOs have a legitimate administrative need to ensure that such benefits are provided to those who are entitled to them and that they are not provided to those whose eligibility status may have changed. The role of a first sergeant is multifaceted, and as such, MSgt Vernoski's duties included addressing questions about dependent entitlements. *See* para. 1.2, Air Force Instruction 36-2113, The First Sergeant (1 August 1996).

Given the plethora of diverse benefit programs administered by a host of different DoD organizations, members of the armed forces are well aware of the significant

potential for errors in the collection, processing, and storage of personnel information. In this context, information coming to the attention of a military official that raises questions about the eligibility status of a servicemember's spouse or dependents does not, in itself, establish a basis for designating that member as a suspect for purposes of Article 31, even if the official has a "hunch" that further inquiries may disclose a crime. *Cf. United States v. Meeks*, 41 MJ 150, 161 (CMA 1994)

In the present case, however, the command had much more than a hunch that appellant had committed an offense. MSgt Vernoski brought appellant's situation to the attention of the chief of military justice on Friday afternoon because he regarded it as "unusual" and he had "never seen or come across a bigamy case." The chief of military justice described the conversation as addressing a "potential bigamy case in their unit." These circumstances underscore that this was more than simply visiting the legal office to discuss an administrative matter. MSgt Vernoski and Capt Myatt had good reason to suspect appellant of bigamy at that time, based upon the following information: (1) the first Mrs. Swift had been called by the second Mrs. Swift, a person claiming to be appellant's wife, and the second Mrs. Swift had asserted there was a divorce in Pike County, Kentucky; (2) the first Mrs. Swift had never signed a divorce decree and had not been provided any notice that her husband was seeking a divorce; (3) to the best of the first Mrs. Swift's knowledge, she was still married to appellant; (4) the first Mrs. Swift had determined there was no record of such a divorce in Pike County; (5) if there had been no divorce, the first Mrs. Swift wanted appellant prosecuted for bigamy; (6) as recently as the fall of the previous year, MSgt Vernoski had counseled appellant about matters related to appellant's marriage to the first Mrs. Swift, during which appellant told him that he was still married to her, yet the second Mrs. Swift asserted that a divorce had taken place more than 2 years ago—a divorce which, according to the first Mrs. Swift, was not recorded in the county referred to by the second Mrs. Swift; (7) several current military records still listed the first Mrs. Swift as appellant's wife; and (8) the first Mrs. Swift

had been disenrolled as a beneficiary under DEERS, and the second Mrs. Swift had been enrolled as appellant's spouse under DEERS.

On Monday morning, prior to confronting appellant, MSgt Vernoski's concerns about the case led him to review the provisions of the Manual for Courts-Martial concerning the offense of bigamy. His review of the Manual was not simply preparation for a worst case scenario. The grounds for suspecting appellant of bigamy were reinforced by a call he received from the first Mrs. Swift prior to his meeting with appellant, in which she reiterated that she did not think the divorce "was legal" and provided him with the name and phone number of the clerk with whom she had spoken at the Pike County Courthouse. When appellant reported, as ordered, MSgt Vernoski began the interrogation by setting forth the "accusations" made by the first Mrs. Swift and asking appellant to respond.

Under the objective test, we conclude as a matter of law that these circumstances demonstrate that MSgt Vernoski "reasonably should have believed" that appellant was a suspect with respect to the offense of bigamy prior to this interrogation. *See Good, supra* at 108. The fact that MSgt Vernoski was hopeful that appellant would be able to clarify his marital status, just as he had been able to clarify prior problems with his wife's allotment, does not lead to a different result. In light of the relatively low quantum of evidence required to treat an individual as a suspect, MSgt Vernoski's hope that events would exonerate appellant was not incompatible with his responsibility to treat appellant as a suspect based upon the amount of information about the possibility of bigamy that he had acquired before confronting appellant. It is not unusual for a superior to be hopeful that circumstances will vindicate a subordinate, particularly when that subordinate has proved trustworthy in the past. Such a feeling, no matter how well motivated, does not deprive a member of the armed forces of the right to be warned under Article 31(b) when the objective facts point to the subordinate as a suspect. Under the circumstances of this case, we find that a reasonable person would have considered appellant a suspect, requiring a rights' warning advisement. *See United*

States v. Muirhead, 51 MJ 94 (1999)(military judge erred when he relied upon the subjective opinions of the agents as to whether Article 31(b) warnings were required where facts supported finding that reasonable person would have suspected accused of an offense.)

C. *Questioning By A Military Superior: Application of the Disciplinary Presumption*

Under our case law, we also consider whether MSgt Vernoski was acting in a law enforcement or disciplinary capacity in light of the "strong presumption" that questioning by a military superior in the "chain of command" is part of a "disciplinary" investigation. *Good, supra* at 108. As discussed in Part IIB, *supra*, although MSgt Vernoski had appropriate administrative concerns about appellant's marital status, the circumstances of this case led to significant disciplinary considerations in the conduct of the investigation.

From the initial telephone call from the first Mrs. Swift to the first confrontation with appellant, the nature of the actions taken by MSgt Vernoski and Capt Myatt underscore the priority they placed on military justice implications—including their joint visit to the personnel office and the base legal office, their consultation with the chief of military justice concerning a "potential bigamy case," MSgt Vernoski's study of the bigamy provisions in the Manual for Courts-Martial, and MSgt Vernoski's ordering of appellant to report to his office to respond to the "accusations" made by the first Mrs. Swift.

Based on the foregoing considerations, in the context of the information provided by the first Mrs. Swift and the information developed through their own inquiries, we conclude as a matter of law that the Government failed to rebut the strong presumption that MSgt Vernoski's interrogation was part of an investigation that included disciplinary purposes. Under the circumstances, he should have provided appellant with the statutorily required rights' warnings, including the warning that he did not have to "make any statement regarding the offense" of which he was suspected.

Art. 31(b). Accordingly, we hold that the military judge erred when he determined that rights' warnings were not required under Article 31(b).

D. *Admissibility of Unwarned Statements*

We next examine whether the verbal statements, although unwarned, were nonetheless admissible. Congress, in Article 31(d), provided a strict enforcement mechanism to implement the rights' warning requirements in Article 31(b):

> No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

This provision, like Article 31(b), was established by Congress in the aftermath of World War II. Since then, Congress has not exempted any of the substantive offenses under the UCMJ from the coverage of Article 31(d), no matter how serious. Article 31(d) applies to all substantive crimes, including offenses that have a critical impact on good order, discipline, and national security, such as murder, rape, robbery, aiding the enemy, mutiny, espionage, spying, and making false official statements. *See United States v. Price*, 7 USCMA 590, 23 CMR 54 (1957) (invalidating, as inconsistent with Article 31, a provision of the Manual for Courts-Martial that permitted use of a statement obtained in violation of Article 31(b) to prove a charge of making a false official statement).

More than 40 years have passed since we observed in *Price* that the express language of Article 31 did not permit a false official statement prosecution to be based upon an unwarned statement. Congress has amended the UCMJ numerous times since *Price* was decided in 1957, but none of the amendments has modified the clear limitations in Article 31(d).[2]

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[2]During the same period, by contrast, Congress endeavored to circumscribe the exclusionary rule under *Miranda*, *see* 18 USC §3501. The Supreme Court recently determined that the legislation was unconstitutional, relying in part on the doctrine of *stare decisis*. *Dickerson v. United States*, ___ U.S. ___, ___, 120 S.Ct. 2326, 2336, 147 L.Ed.2d 405 (2000).

After *Price*, the Army issued the following guidance with respect to the impact of that case on the Manual for Courts-Martial:

> **Notwithstanding provisions of par. 140a, MCM, to the contrary, a prosecution for making a false official statement is not exempt from restrictions of Art. 31 regarding pretrial statements of an accused or suspected person.** Accordingly, when a statement is obtained from an accused who has not been warned of his right against self-incrimination and the circumstances are such that the warning is required by Art. 31, the statement is inadmissible even though the case in which it is offered is a prosecution for making a false official statement.

U.S. Army, 1959 Cumulative Pocket Part to the Manual for Courts-Martial, United States, 1951, at 71 (emphasis in original). The President, in a subsequent revision of the Manual, expressly provided that "in a case in which a statement of the accused so obtained [in violation of applicable warning requirements] is charged as being false, it cannot be received in evidence to show that he made it." Para. 140a(6), Manual for Courts-Martial, United States, 1969 (Revised edition); *see* Analysis of Contents, Manual for Courts-Martial, United States, 1969, Revised Edition at 27-11 (Dep't of the Army Pamphlet 27-2 (1970)) (citing *Price*).

The 1951 Manual, in a separate provision regarding impeachment of witnesses, provided that an accused who testified as a witness could not be cross-examined on the basis of a statement obtained in violation of applicable rights' warning requirements, para. 153*b*(2)(c), and this provision was retained with minor modifications in the 1969 Manual. Subsequently, in *United States v. Jordan*, 20 USCMA 614, 44 CMR 44 (1971), we considered the impact of the Manual's rule in a situation where the member received rights' warnings under Article 31 but did not receive the right-to-counsel warnings required by *United States v. Tempia*, 16 USCMA 629, 37 CMR 249 (1967) (holding that the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), apply to custodial

interrogations in the armed forces). Although we concluded in *Jordan* that the statement could not be used for impeachment based on the Manual's restrictions, we noted that the President was not precluded from amending the Manual to permit impeachment of a testifying accused through use of a statement obtained without provision of such warnings. *Jordan* was based on the premise that the "shield" provided by the rights' warning requirements "cannot be perverted [by a testifying defendant] into a license to use perjury by way of a defense, free from the risk of confrontation with prior utterances." 20 USCMA at 617, 44 CMR at 47 (quoting *Harris v. New York*, 401 U.S. 222, 226 (1971)).

Despite the invitation for change set forth in *Jordan*, the two significant revisions of the Manual for Courts-Martial adopted in the 1970s did not address the impeachment issue. See Exec. Order No. 11835, 40 Fed. Reg. 4247 (1975); Exec. Order No. 12018, 42 Fed. Reg. 57943 (1977). The Manual continued to preclude impeachment by an unwarned statement until the evidentiary material in the Manual, which included extensive guidance and examples, was replaced entirely by the Military Rules of Evidence in 1980. Chapter XXVII, Manual For Courts-Martial, United States, 1969 (Revised edition); *see* Exec. Order No. 12198, 45 Fed. Reg. 16932 (effective Sept. 1, 1980).

Reflecting the fact that *Jordan* involved a situation in which there had been compliance with the rights' warning requirement under Article 31 but noncompliance with the constitutionally-based, *Miranda-Tempia* counsel warning requirements, the 1980 amendments permitted impeachment of a testifying accused by an unwarned statement, but limited the provision to statements obtained in violation of the *Miranda-Tempia*, counsel warning requirements. Under the new rule, Mil.R.Evid. 304(b), a statement obtained after failure to provide the *Miranda-Tempia* warning concerning the right to consult with counsel could be used "to impeach by contradiction the in-court testimony of the accused or the use of such statement in a later prosecution against the accused for perjury, false swearing, or the making of a false official

statement." The Drafters' Analysis noted that this provision "adopts *Harris v. New York*, 401 U.S. 222 (1971) insofar as it would allow use for impeachment or at a later trial for perjury, false swearing, or the making of a false official statement, or statements taken in violation of the counsel warnings required under Rule 305(d)-(e)." The Analysis emphasized the limited scope of the new rule by adding: "A statement obtained in violation of Article 31(b), however, remains inadmissible for all purposes . . . ." 1969 Manual, *supra* at A18-19.

In 1990, the Rule was amended further to permit limited use of a statement obtained in violation of the warning requirements of Article 31(b) and the related Military Rules of Evidence "to impeach by contradiction the in-court testimony of the accused or the use of such statement in a later prosecution against the accused for perjury, false swearing, or the making of a false official statement." The Drafters' Analysis cited *Harris* and our decision in *United States v. Williams*, 23 MJ 362 (1987). Furthermore, the Analysis, reflecting *Harris*, stated that "[a]n accused cannot pervert the procedural safeguards of Article 31(b) into a license to testify perjuriously in reliance on the Government's disability to challenge credibility utilizing the traditional truth-testing devices of the adversary process." The Analysis also noted that when there is a violation of the rules requiring cessation of questioning, "the deterrent effect of excluding the unlawfully obtained evidence is fully vindicated by preventing its use in the Government's case-in-chief, but permitting its collateral use to impeach an accused who testifies inconsistently or perjuriously." Manual for Courts-Martial, United States (1998 ed.) at A22-10.

The underlying theory of the 1990 change was that the accused is the gatekeeper as to admission of the unwarned statement and that only an inconsistent or perjurious statement by an accused who testifies at trial opens the gate. The accused, in deciding whether to testify, must consider whether he or she will thereby risk impeachment by contradiction or a "later prosecution." Mil. R. Evid. 304(b). The rule is based on the premise that Article 31(d) provides a

shield when the prosecution seeks to use an unwarned statement as a sword against the accused, but does not shield an accused from cross-examination or a later prosecution when it is the accused, not the Government, who opens the door to questioning the veracity of his or her testimony at trial.[3] *Cf. Williams, supra* at 367-68 (precluding use of an unwarned statement to rebut evidence presented on behalf of an accused who has not opened the door through his or her in-court testimony).

Although in-court testimony is not at issue in the present case, we note that when an accused has opened the door to consideration of an unwarned statement through such testimony, reliance on Mil.R.Evid. 304(b) in a "later prosecution" may be viewed as consistent with our precedents regarding impact of actions by an accused in a judicial setting that affect the member's statutory rights. *See, e.g., United States v. Gammons*, 51 MJ 169, 183 (1999) (although the accused is the gatekeeper as to admissibility of records of prior non-judicial punishment for the same offenses, the Government may rely on such evidence if the accused has opened the door); *cf. United States v. Dowty*, 48 MJ 102, 110 (1998) (if the accused invokes a judicial proceeding under the Right to Financial Privacy Act, which has the effect of delaying military justice proceedings, the Government can rely on the provisions of that Act tolling "any applicable statute of limitations").

Because appellant did not testify in the present case, the unwarned statements were not used for purposes of impeachment or otherwise to prove that he testified falsely at

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[3] *Cf. United States v. Lewis*, 12 MJ 205, 208 (CMA 1982) (noting in dicta that a person who chooses to testify falsely rather than asserting the privilege against self-incrimination can be prosecuted for perjury regardless of whether the statement would be admissible with respect to another offense). The *dicta* in *Lewis* was confined to the example of an accused who opened the door by testifying. The actual holding in *Lewis*, which involved a charge of disrespect to a superior commissioned officer, is limited to permitting use of an unwarned statement to show the disrespect. The Court emphasized that the use with respect to that offense was "not in any way related to the truth, falsity, or reliability of its meaning." *Id.* at 208.

trial. The Government, however, asks us to apply Mil.R.Evid. 304(b) in a manner that would permit unwarned statements made during an investigation and obtained in violation of Article 31(b) to be introduced by the prosecution to prove essential elements of false official statements in its case-in-chief.

We decline to interpret the Rule as applying to circumstances in which the accused has not opened the door to consideration of the unwarned statement by his or her in-court testimony. Applying the rule to a non-testifying accused, as urged by the Government, would place the Rule in direct conflict with Article 31(d). *See United States v. Price*, *supra*. In any such conflict, the Manual provision must yield to the statute. Article 36(a), UCMJ, 10 USC § 836(a) (the rules of evidence in the Manual for Courts-Martial may not be "contrary to or inconsistent with" the Code); *United States v. Lopez*, 35 MJ 35, 39 (CMA 1992) (under the "hierarchical sources of rights" applicable to the military justice system, federal statutes prevail over provisions of the Manual for Courts-Martial unless the Manual provision provides the servicemember with greater rights than the statute).

These considerations are particularly important in the absence of congressional action to overturn a precedent of this Court that is based upon the plain meaning of a statute and that is consistent with the context in which the statute was enacted. *See Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391,393 (1992)("[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.")

We are well aware of the corrosive impact of false statements on military effectiveness, and we have forthrightly rejected precedents from the civilian sector that would diminish the effectiveness of Article 107. *See United States v. Solis*, 46 MJ 31 (1997) (rejecting the so-called "exculpatory no" defense to false-statement prosecutions

under Article 107).[4] In declining to apply civilian analogies to Article 107, *Solis* reflected our deference to the paramount role of Congress in shaping the military justice system. We emphasized that Congress, which created the military's false official statement statute embodied in Article 107, did not include an "exculpatory no" defense in Article 107 and that the responsibility for evaluating the desirability of including such a provision was within the province of the Legislative Branch, not this Court. *Id.* at 36.

The same considerations apply to the present case. The requirement to provide specific rights' warnings in Article 31(b) and the restriction on use of statements obtained in violation of those rights in Article 31(d) represent decisions made by Congress, not this Court. In the more than 40 years since *Price* was decided — including many years in which the Manual for Courts-Martial expressly prohibited use of unwarned statements in false statement prosecutions — Congress took no action to create an exception to Article 31(d) for false statement cases arising under Article 107. Congressional inaction, in such circumstances, must be given great weight "because the primary responsibility for overruling decisions on statutory construction is with Congress." *United States v. Gibson*, 43 MJ 343, 346 (1995). The decision as to whether it is necessary to reexamine the relationship between Article 31(d) and Article 107 to determine whether unwarned statements should be admissible in the case-in-chief against a non-testifying servicemember for making a false official statement rests with Congress, not this Court. *Cf.* 18 USC § 6002 (proscribing use of certain immunized testimony "in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order" to provide immunized testimony).

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[4]We reached this decision notwithstanding the fact that a majority of the federal appellate courts that had addressed the issue at the time of our decision had endorsed the exculpatory-no doctrine with respect to a similar civilian offense). *See* 46 MJ at 34 & n.9. Subsequently, the Supreme Court disapproved use of the excuplatory-no defense in federal, civilian criminal trials. *Brogan v. United States*, 522 U.S. 398, 118 S.Ct. 805, 139 L.Ed.2 830 (1998).

The dissent suggests that we should rely on analogies from civilian life to exempt Article 107 offenses from the coverage of Article 31(d). In some instances, consideration of criminal law developments in the civilian sector may be helpful when addressing aspects of the military justice system. However, when this Court assesses legislation created by Congress under its constitutional authority to "raise and support" the armed forces and "make Rules for the Government and Regulation" of those forces, we must be guided by the highest degree of deference to congressional action. U.S. Const., art. I, § 8, cl. 12-14; *Rostker v. Goldberg*, 453 U.S. 57 (1981). So long as Congress does not act in disregard of the Constitution, we are obligated to respect congressional judgments as to the rights and obligations of members of the armed forces. *Id.* at 67. Judicial deference to the balance drawn by Congress applies not only when Congress has provided servicemembers with rights less protective than those available to their civilian counterparts, but also when Congress has provided greater rights.

The dissent is based primarily upon cases from the civilian sector, none of which involve the factual predicate we have in this case—the prosecution for a false statement, made in the absence of required self-incrimination warnings, and admitted during the prosecution's case-in-chief. Instead, many of the cases cited in the dissent involve circumstances in which a person held a grant of immunity, testified, and then was prosecuted on the grounds that the testimony was false. Those cases are based on the premise that a person who knows that he or she has the protection against self-incrimination embodied in a grant of immunity cannot choose to abuse the privilege through false testimony. This is in stark contrast to the present case, which involves a non-testifying person who was not provided with a statutorily required warning about self-incrimination protections. Most of the remaining cases cited in the dissent involve situations in which rights' warnings were not required as a matter of law, which mooted the question whether an illegally obtained statement could be used against the individual.

The dissent agrees that rights' warnings were required under Article 31(b), but declines to apply the statutorily mandated procedure for enforcing that requirement under Article 31(d), based on civilian precedent. Although we should give appropriate consideration to criminal law precedents, when we interpret the statutory provisions embodied in the Uniform Code of Military Justice, we must be particularly cautious in applying analogies from the civilian sector that involve judicial modifications of judicially-crafted doctrines, *see Dickerson*, 120 S.Ct. at 2335, or that involve interpretation of statutes that do not reflect the unique circumstances of military service. It is not our province to use such analogies to vitiate otherwise constitutional judgments by Congress about the rights and obligations of members of the armed forces.

E. *The Production Of The Divorce Decree*

The production of the divorce decree, however, raises a separate issue—whether appellant had a Fifth Amendment or Art. 31(a) privilege as to the production of the divorce decree—which is distinct from the requirement to give the rights' advisement under Article 31(b). It is well "settled . . . that a person may be required to produce specific documents even though they contain incriminating assertions of fact or belief because the creation of those documents was not 'compelled' within the meaning of the privilege." *United States v. Hubbell*, ___ U.S. ___, ___, 120 S.Ct. 2037, 2043 (2000). That proposition rests upon the legal distinction between the contents of the document and the testimonial significance of producing the documents. *Id.* The contents of documents voluntarily prepared before the compelled production are not protected by the Fifth Amendment or Article 31(a) because the documents "could not be 'said to contain compelled testimonial evidence.'" *Id.* at 2043 (*quoting Fisher v. United States*, 425 U.S. 391, 409-10 (1976)).

In this case, the record indicates that appellant voluntarily created a purported divorce decree before MSgt Vernoski requested its production. Appellant's personnel records reflected the fact that he had produced a divorce

decree for purposes of changing spousal enrollment under DEERS well before MSgt Vernoski initiated his investigation. The DEERS form stated that appellant was divorced on September 14, 1994, the same date as listed on the purported divorce decree later provided to MSgt Vernoski. Additionally, the second Mrs. Swift told the first Mrs. Swift that she had the divorce decree in her possession during their first phone conversation, the day before MSgt Vernoski initiated his investigation. He also knew that the second Mrs. Swift told the first Mrs. Swift that the divorce decree indicated that she and appellant were divorced in September of 1994 and that the decree was filed in Pike County.[5] It is apparent that MSgt Vernoski's request for a divorce decree was made in the context of his understanding that appellant had provided a document purporting to be a divorce decree to the personnel office a month earlier.

In short, MSgt Veroski did not simply ask appellant to provide information about his marital status, but instead requested appellant to provide a document which appellant previously had produced at the personnel office to change appellant's DEERS form. Under these circumstances, appellant could not have objected to producing the divorce decree solely on the basis that the fraudulent contents were incriminating because MSgt Vernoski's request was based on facts indicating that the document, a divorce decree, had been created prior to the order to produce it. *See Fisher v. United States, supra.*

The Supreme Court also has stated "that the act of producing documents in response to a subpoena may have a compelled testimonial aspect" if "'the act of production' . . . implicitly communicate[s] 'statements of fact.'" *Hubbell*, ___U.S. at ___, 120 S.Ct. at 2043; *see also United States v. Oxfort*, 44 MJ 337, 338 (1995) (citations omitted). Even if appellant's act of

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[5]Although not necessary to our decision on this issue, we note that this was the same date and location indicated in the divorce decree later provided by appellant to MSgt Vernoski. The record also indicates that the second Mrs. Swift provided a copy of what she believed was appellant's divorce decree to MSgt Vernoski the day after appellant gave the document in question. Upon comparison of the two documents, MSgt Vernoski concluded that they were identical.

producing the divorce decree had testimonial aspects which arguably were incriminating, the production would fall within the "required records" exception to the Fifth Amendment and Article 31(a). *See United States v. Shapiro*, 335 U.S. 1 (1948); *see also Grosso v. United States*, 390 U.S. 62, (1968); *Oxfort*, 44 MJ at 339 (1996). If the Government requires documents to be kept for a legitimate administrative purpose, neither the content nor the act of production of these documents are protected by the Fifth Amendment. *See Shapiro*, 335 U.S. 1; *see also United States v. Sullivan*, 274 U.S. 259 (1927) (rejecting Fifth Amendment objection to requirement to file income tax return).

To constitute "required records," the documents must satisfy the following test: (1) the requirement that they be kept "must be essentially regulatory"; (2) the records must be the "kind which the regulated party has customarily kept"; and (3) the records themselves must be either public documents or "have assumed 'public aspects' which render them at least analogous to public documents." 390 U.S. at 67-68; *see also In re Dr John Doe*, 711 F. 2d 1187 (2d Cir. 1983).

The requirement to produce a divorce decree in order to establish and update military records supporting spousal eligibility for government benefits is regulatory; the divorce decree is the type of record customarily kept by a party; and it is a public record. The personnel office's requirement for the servicemember to produce a copy of his divorce decree served a legitimate administrative purpose—to determine spousal eligibility for government benefits. Under these circumstances, the divorce decree was a "required record," the production of which falls within the exception to the Fifth Amendment and Article 31(a). *See United States v. Oxfort, supra.* Under the facts and circumstances of this case, even if MSgt Vernoski had provided the required Article 31(b) warnings, appellant could not have objected to an order to produce the divorce decree that he had previously provided to the personnel office. Because appellant had no Fifth Amendment or Article 31(a) privilege in either the content or the act of production of the divorce decree, we conclude that the military judge did not err in admitting the divorce decree into evidence.

F. Impact Of The Inadmissible Evidence

The question remaining is whether the error in admitting the verbal statements obtained in violation of Article 31 had a prejudicial impact. Three aspects of the case potentially were affected by the illegally obtained statements: the bigamy conviction, two of the false official statement convictions, and the sentence.

1. The Bigamy Conviction

In support of the bigamy specification, the prosecution produced evidence of two marriage certificates— one to the first Mrs. Swift dated August 28, 1990, and the other to the second Mrs. Swift dated January 1, 1996—and the fraudulent divorce decree. Additionally, the prosecution offered the testimony of the first Mrs. Swift, who testified that she knew of no divorce action by appellant.

The first Mrs. Swift also testified that she and appellant specifically decided not to obtain a divorce at the time of their separation because she would lose her military medical benefits and dependent identification card. She testified further that appellant, during a telephone conversation, had told her that he had a serious interest in another woman, and she asked him whether he wanted a divorce. She testified that he had responded that they would just maintain the status quo and not obtain a divorce. This conversation took place in January 1996 —after, unbeknownst to her, he already had married the second Mrs. Swift. In light of the significant evidence that was not derived from the unwarned statements, we are satisfied beyond a reasonable doubt that appellant was not prejudiced as to the bigamy conviction.

2. The False Statement Convictions

In the first false statement specification, appellant was charged with making a false official statement when, in response to a question from MSgt Vernoski, he said that he was divorced from the first Mrs. Swift and that a named civilian

attorney had represented him in the divorce proceeding. This specification was based upon appellant's verbal response to an unwarned inquiry. Without that evidence, there is no proof of an offense, and the specification must be dismissed.

In the second specification at issue, appellant was charged with making a false official statement when he presented to MSgt Vernoski "an official statement, to wit: a purported divorce decree, which document was totally false . . . ." Unlike the first specification, the second false official statement specification was based upon evidence properly admitted against appellant. In addition to the document itself, the Government offered evidence that the divorce decree had never been filed at the Pike County Courthouse nor signed by an active Circuit Court Judge, as it purported. In light of the Government's evidence on this specification, we are satisfied that there was sufficient evidence to find appellant guilty of this specification without reliance upon any of appellant's unwarned statements.

3. The Sentence

Even without the first false official statement offense, appellant remains convicted of making two separate false official statements; two specifications of writing bad checks; bigamy; and impeding an investigation. Appellant's sentence included a bad-conduct discharge and reduction to the lowest enlisted grade, but did not include either confinement or forfeitures. In light of the remaining offenses and the evidence in this case, we are convinced beyond a reasonable doubt that the error with respect to the dismissed offense was not prejudicial as to the sentence.

III. DECISION

The decision of the United States Air Force Court of Criminal Appeals is reversed as to specification 1 of Charge I. The finding of guilty as to that specification is set aside, and that specification is dismissed. In all other respects, the decision below is affirmed.

SULLIVAN, Judge (concurring in part and dissenting in part):

Appellant was a soldier with two wives, one of whom was bombarding his command with complaints about his suspected bigamy. His first sergeant (lst Sgt) had good reason to suspect these complaints were true when he called appellant into his office to hear "his side of the story." Unfortunately, he did not advise appellant of his rights under Article 31 with respect to this suspected criminal offense. This failure to warn was wrong as both the majority and I agree. *See generally United States v. Good*, 32 MJ 105, 108 (CMA 1991) (and case cited therein).[1]

Nevertheless, the lST Sgt (in pursuing his duties to clear up the inconsistencies in appellant's administrative records and in response to the complaints of appellant's first wife) proceeded to get appellant to explain his true marital status. The Army had a right to know since housing, medical, and other administrative benefits are dependent on the correct marital status of a servicemember. The record shows that appellant (in response to requests from the lST Sgt) told the lST Sgt that he was divorced from his first wife and gave the lST Sgt a false divorce decree. There was no evidence that appellant was coerced to lie to his lST Sgt or to give a false divorce decree to him. These acts form the basis for the two charges of giving false official statements.

Today, the majority sets aside appellant's conviction on one of these charges. In the process, *it effectively provides military suspects an unparalleled right to lie in their official statements to their military superiors or other government authorities.* In my view, such a holding directly contradicts existing precedent from our Court, an applicable Manual provision, and analogous Supreme Court, Court of Appeals and state court decisions. I dissent and would affirm appellant's

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[1]The lead opinion in *United States v. Good*, 32 MJ 105, 108 (CMA 1991), has been repeatedly recognized as the law of this Court. *See United States v. Muirhead*, 51 MJ 94, 96 (1999); *United States v. Meeks*, 41 MJ 150, 161 (1994); *United States v. Davis*, 36 MJ 337, 340 (1993), *aff'd*, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994).

convictions for making false official statements in violation of Article 107, Uniform Code of Military Justice, 10 USC § 907.

When one looks at this case from a distance, one could say that there is agreement by all the members of this Court on the requirement for warnings against self-incrimination. The different outcomes of the majority and my dissent are caused by the two different approaches to application of the exclusionary rule to the facts of this case. The majority takes a broad view of the exclusionary rule which allows appellant to escape any prosecution for the two false-official-statement charges. *But cf. United States v. Wong*, 431 U.S. 174 (1977) (conviction for perjurious testimony sustained on basis of evidentiary use of unadvised but false statements); *United States v. Knox*, 396 U.S. 77 (1969) (conviction for making false official statement sustained regardless of validity of Government's request for information). My dissent applies a narrow, more conservative view of the exclusionary rule which would affirm his convictions for the two false-official-statement charges. *See Glickstein v. United States*, 222 U.S. 139 (1911) (holding that similarly worded exclusionary-rule statute should not be interpreted to permit the giving of false testimony with impunity).

In my view, appellant had *the right to be warned* not to incriminate himself, but he had *no right to lie* in an official statement or to give a false divorce decree to his superiors in the U.S. Army. *See generally* 8 Wigmore, *Evidence* §§ 2270(2)(b) n.7 and 2282(1)(c) (McNaughton rev. 1961). Neither the Constitution nor the Code gives him such a right to lie or deceive. *See Brogan v. United States*, 522 U.S. 398, 404 (1998). ("neither the text nor the spirit of the Fifth Amendment confers a privilege to lie"); *United States v. Lewis*, 12 MJ 205, 208 (CMA 1982) (following *United States v. Madujano*, 425 U.S. 564 (1976), and *Glickstein v. United States*, *supra*, in applying Article 31(d)). Moreover, I will not judicially create such a right of immunity.

The thrust of the majority's opinion is that the broad wording of Article 31(d) expresses the careful judgment of Congress that the servicemember should have an exclusionary

rule affording greater protection than that afforded his civilian counterpart. 53 MJ at 445. The legislative history of this provision does not support such speculation by the majority. *Cf. United States v. Apfelbaum*, 445 U.S. 115, 121-123 (1980) (no speculation as to Congress' intent where it is inescapably supported by language and legislative history). Moreover, the majority's construction of Article 31(d) flouts "constitutional hornbook" law, well-settled by 1950, that prosecutions for perjury are permissible even if no perjury exception is provided in an immunity statute. *United States v. Housand*, 550 F.2d 818, 822 (2d Cir. 1977) citing *United States v. Bryan*, 339 U.S. 323(1950); and *Heike v. United States*, 227 U.S. 131, 141 (1913) (Holmes, J., noting statutory proviso for perjury prosecution "added only from superfluous caution").

Instead, I adhere to the past decisions of this Court recognizing that Congress intended our exclusionary-rule remedy to be commensurate with the Fifth Amendment exclusionary rule, as traditionally delineated by the Supreme Court, unless expanded by the President in the Manual for Courts-Martial. *See United States v. Williams*, 23 MJ 362, 368 (CMA 1987); *United States v. Jordan*, 20 USCMA 614, 617, 44 CMR 44, 47 (1971); *United States v. Caiola*, 18 USCMA 336, 340-41, 40 CMR 48 (1969) (Darden, J., lead opinion). This Court's decision in *United States v. Lewis, supra*,[2] recognized this point and expressly permitted admission of evidence of unadvised statements to prove a subsequent disrespect offense. Moreover, the Supreme Court in *Harris v. New York*, 401 U.S. 222 (1971), did not suggest that unwarned statements of a suspect could not be used in the prosecution's case-in-chief for any subsequent crimes. *See United States v. Wong, supra* (a post-*Harris* case refusing to apply Fifth Amendment exclusionary rule to case-in-chief evidence showing perjury before grand jury).

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[2]In *United States v. Lewis*, 12 MJ 205, 208 (CMA 1982), a unanimous Court stated: "Under these circumstances, we hold that failure to give an Article 31 advisement does not bar admission into evidence of the accused's statement which, by its substance and context, constitutes a separate and distinct violation of the Uniform Code."

In my view, *Harris v. New York*, *supra*, does not support the broad "case-in-chief" exclusionary rule espoused by the majority in this case. In *Harris*, the precise question was whether an accused's pretrial statement, inadmissible under *Miranda v. Arizona*, 384 U.S. 436 (1966), in the prosecution's case-in-chief to *prove the sale of heroin*, could nonetheless be used in rebuttal to impeach an accused's trial testimony as to that drug offense. The Supreme Court *approved* an impeachment exception to the federal exclusionary rule as a part of the *Miranda* decision. 401 U.S. at 224-25. However, it did not purport to limit exceptions to the *Miranda* exclusionary rule to the impeachment situation. In fact, it cited as authority, *United States v. Knox*, 396 U.S. 77 (1969), a case which recognized the traditional false-official-statement exception to the Fifth Amendment exclusionary rule.

Furthermore, in *United States v. Madujano*, 425 U.S. 564 (1976), the Supreme Court subsequently approved the admission of similarly unwarned statements in the prosecution's case-in-chief for the offense of making a false statement to a grand jury. There, it approved its earlier decision in *Bryson v. United States*, 396 U.S. 64, 72 (1969) (prosecution for providing a false affidavit) and stated "similarly our cases have consistently—indeed without exception—allowed sanctions *for false statements or* perjury; they have done so even in instances where the perjurer complained that Government exceeded its constitutional powers in making the inquiry." 425 U.S. at 577 (emphasis added); *see also United States v. Knox*, *supra*. Federal practice in this regard seems clear to me. *See United States v. Raftery*, 534 F.2d 854, 857 (9th Cir. 1976), cited with approval in *United States v. Lopez-Martinez*, 725 F.2d 471, 476 (9th Cir. 1984).

The majority broadly dismisses as inapplicable these Supreme Court cases (*Brogan*, *Wong*, *Knox*, *Bryson*, *Mandujano*, and *Glickstein*) as well as a decision of one of our fellow U.S. Courts of Appeals, *United States v. Veal*, 153 F.3d 1233, 1241 (11th Cir. 1998) (holds that Supreme Court has not excluded from criminal liability false statements made to government agents or agencies in violation of the Fifth

Amendment, whether made under oath), *cert. denied*, 119 S.Ct. 2024 (1999).) In my view, however, although there may be some differences in terms of the nature of the Fifth Amendment violation in these cases, that does not alter applicability of their truthfulness rationale to our particular Article 31(d) question. The bottom line is that stated long ago in *Glickstein v. United States*, 222 U.S. at 142: "[I]mmunity afforded by the constitutional guaranty relates to the *past and does not endow the person who testifies with a license to commit perjury.*" (Emphasis added.)

In my view, Congress was aware of this bedrock judicial principle of self-incrimination law when it enacted Article 31(d) and intended it to apply to servicemembers as well. *See generally Brogan v. United States, supra* at 406-07 (citing cases where "background interpretive principles of general application" considered in construing criminal statute); *see Hearings on H.R. 2498 Before a Subcomm. of the House Armed Services Comm., 81st Cong., 1st Sess.* 984 (1949) (Article 31 structured to generally conform with "the privilege against self-incrimination"), and *United States v. Aronson*, 8 USCMA 525, 529-30, 25 CMR 29, 33-34 (1957).

The majority further suggests that Mil. R. Evid. 304(b)(1) has been improperly urged by the Government in this case to permit use of the unadvised statements in a prosecution for making a false official statement. It notes language in the 1980 Drafters' Analysis suggesting that "a statement obtained in violation of article 31(b), however, remains inadmissible for all purposes" as supporting its view. I disagree.

Mil. R. Evid. 304(b)(1) (1990) states the contrary. It says:

(b) *Exceptions.*

(1) Where the statement is involuntary only in terms of noncompliance with the requirements of Mil. R. Evid. 305(c) or 305(f), or the requirements concerning counsel under Mil. R. Evid 305(d), 305(e), and 305(g), *this rule does not prohibit* use of the statement to impeach by contradiction the in-court testimony of the accused or *the use of such statement*

in a later prosecution against the accused for perjury, false swearing, *or the making of a false official statement.*

(Emphasis added.)

This language responded to this Court's previous decision in *United States v. Jordan*, *supra* at 617, 44 CMR at 47, which noted that the Manual exclusionary rule was broader than federal practice. The amended rule permits use of unadvised statements in the Government's case-in-chief in a false-official-statement prosecution as consistent with federal-exclusionary-rule practice. *See United States v. Wong* and *United States v. Knox*, both *supra*. Coincidentally, the Drafters' Analysis for this new rule no longer contains the Article 31(b) language touted by the majority.

In sum, there is a basic difference between the majority's view and my view of this case. It centers on one of the core aspects of the Federal Exclusionary Rule. I believe Article 31 (like the Fifth Amendment) only applies to *past crimes*, *i.e.*, those committed before the interrogation where there were no self-incrimination warnings. The majority wants to ignore our Court's and federal civilian courts' case law to say that, if there were no warnings of self-incrimination, any soldier can then lie under oath in an interrogation (*i.e.*, commit a present crime). I don't think that the post-World War II Congress was ignorant of this distinction between "past" and "present" crimes when they passed Article 31. In my view, the majority is clearly wrong in believing that Congress gives immunity for any crime committed in an unwarned interrogation.

The majority apparently[3] returns to the out-dated, absolutist view of Article 31(d) espoused by this Court prior to

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[3]The majority attempts to have it both ways. On the one hand, it asserts that there are no express exceptions to Article 31(d), in the Uniform Code of Military Justice, which permit use of this evidence in a false-official-statement prosecution. On the other hand, it asserts that evidence of unadvised statements may be used as impeachment evidence or to prosecute for perjury if an accused subsequently testifies falsely at a court-martial. Clearly, the majority's "gatekeeper" creation is not contained in the language of Article 31(d).

the decision of the Supreme Court in *Harris v. New York*, supra. *See United States v. Price*, 7 USCMA 590, 593, 23 CMR 54, 57 (1957). In doing so, it overrules, *sub silentio*, our subsequent decisions which have recognized *Harris v. New York*, *supra*, and earlier Supreme Court Fifth Amendment exclusionary-rule cases as the guiding force for our Article 31(d) case law. *United States v. Lewis* and *United States v. Jordan*, both *supra*. It also breaks ranks with mainstream jurisprudence in state and lower federal courts. *See United States v. Veal*, *supra* (federal cases cited therein); *People v. Thomasello*, 234 N.E. 2d 190 (N.Y. 1967); *Butterfield v. State*, 992 S.W. 2d 448 (Tex. Crim. App. 1999); *McGee v. State*, 782 P.2d 1329, 1331-33 (Nev. 1989).

Finally, in my view, the majority essentially holds that Mil. R. Evid. 304(b)(1) is legally invalid because of Article 31(d). "Applying the rule to a non-testifying accused, as urged by the Government, would place the Rule in direct conflict with Article 31(d). In any such conflict the Manual provision must yield to the statute." 53 MJ at 451 (citation omitted). Supreme Court review of the propriety of such a holding would be most appropriate. *See United States v. Scheffer*, 523 U.S. 303 (1998) (Supreme Court overturns decision of this Court that Mil. R. Evid. 707 prohibiting admission of polygraph evidence was unconstitutional).

APPENDIX B

UNITED STATES, Appellee,

v.

John B. SWIFT, (306-78-6763), Appellant

USCA Misc. Dkt. No. 98-5012/AF
Crim. App. Dkt. No. 32447

ORDER

On further consideration of appellant's petition for reconsideration of this Court's decision, 53 MJ 439 (2000), it is, by the Court, this, 28th day of September, 2000,

ORDERED:

That said petition for reconsideration is hereby denied.

For the Court,

/s/ Thomas F. Granahan
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Counsel for Appellant (JACOBSON)
Counsel for Appellee (WHEELER)

APPENDIX C

UNITED STATES

v.

Staff Sergeant John B. SWIFT, FR306-78-6763
United States Air Force

ACM 32447

4 December 1997

Sentence adjudged 18 September 1996 by GCM convened at Shaw Air Force Base, South Carolina. Military Judge: Keith L. Roberts.

Approved sentence: Bad-conduct discharge and reduction to E-1.

Appellate Counsel for Appellant: Lieutenant Colonel Kim L. Sheffield.

Appellate Counsel for the United States: Colonel Brenda J. Hollis, Lieutenant Colonel Michael J. Breslin, and Captain Steven D. Dubriske.

Before

PEARSON, MORGAN, and SPISAK
Appellate Military Judges

OPINION OF THE COURT

MORGAN, Judge:

Appellant was convicted consistent with his pleas of presenting a false official statement. Contrary to his pleas, officer court members found him guilty of bigamy, impeding an investigation, two false official statements, and writing bad checks. The members sentenced him to a bad-conduct discharge and reduction to E-1. Appellant contends that the military judge erred by failing to suppress certain statements he made to his first sergeant without rights warnings, that using the same act as the basis for one of the false statement specifications and the impeding an investigation charge

constituted an unreasonable multiplication of charges, and that Article 57(a), UCMJ, violates the *Ex Post Facto* Clause of the Constitution with respect to his case. Although we find merit in the *ex post facto* claim, we affirm the findings and sentence.

Factual Background

Appellant's wife, JS, contacted his section commander, Captain Myatt, on Friday, March 8, 1996. JS told Captain Myatt that a woman named SS had called to tell her that appellant had divorced JS and was now married to SS. JS told Captain Myatt that she wanted to know if she was still married to appellant and entitled to dependent benefits. JS and appellant had been separated for several years. JS was living in Michigan with their child while appellant was living at Shaw Air Force Base, South Carolina. JS told Captain Myatt that she thought it was possible they were divorced since they had been discussing it for some time, but she wasn't aware of any divorce action and wanted to be sure. She also said she wanted to get a copy of the divorce decree if one existed, and that she wanted to press bigamy charges against appellant if he hadn't actually divorced her. Captain Myatt told the first sergeant, Master Sergeant (MSgt) Vernoski, about the call and asked him to look into the matter.

MSgt Vernoski first checked the unit's emergency data cards and found that JS was still listed as appellant's wife. He then went to the Military Personnel Flight (MPF) to check appellant's records. He discovered that appellant had recently changed the information in the Defense Eligibility Enrollment Reporting System (DEERS) to reflect SS as his wife. MPF personnel informed MSgt Vernoski that, to make this change, appellant would have been required to produce a copy of the divorce decree. MSgt Vernoski also learned that appellant had not yet changed his emergency data card at the MPF to reflect SS as his wife, but that appellant was in the process of doing so. Following his visit to the MPF, MSgt Vernoski went by the legal office to discuss some other pending disciplinary actions with Major Davis, the Chief of Military Justice. While there, he briefly mentioned appellant's possible bigamy case to Major Davis.

MSgt Vernoski arranged to have appellant come to his office the following Monday morning. Before appellant arrived, JS called the squadron again and spoke to MSgt Vernoski directly. She repeated what she had told Captain Myatt. She also told him that she had called the courthouse in Pike County, Kentucky, and that the clerk was unable to locate a record of appellant's claimed divorce. She provided MSgt Vernoski with the clerk's name and phone number. Out of "curiosity," MSgt Vernoski used his office copy of the Manual for Courts-Martial (MCM) to review the elements of the offense of bigamy. When appellant arrived, MSgt Vernoski told him about the call from JS and asked if he was divorced. Appellant told him that he had been divorced from JS since September 14, 1994, and that she was probably just trying to cause him trouble. MSgt Vernoski mentioned to appellant that she could cause him trouble if he was not divorced and pointed out that the maximum punishment for bigamy in the MCM included two years confinement.

Appellant agreed to bring MSgt Vernoski a copy of the divorce decree the next morning. However, appellant said he didn't want a copy of the divorce decree provided to JS, because his attorney had told him that, if she got a copy of the decree, it might hinder his child custody dispute with her. MSgt Vernoski thought this was an odd comment. MSgt Vernoski remembered counselling appellant in late 1995 about a complaint from JS that she was not receiving proper support from appellant. He reminded appellant that, at that time, appellant told him he was still married to JS. Appellant told MSgt Vernoski that he didn't recall saying that. During that earlier counselling session, appellant told MSgt Vernoski that he had arranged through finance for a support allotment to go to JS. When MSgt Vernoski checked this out, he discovered that appellant was telling the truth, but that finance had mishandled the paperwork.

Over the next two days, appellant told MSgt Vernoski several times that he could not produce a copy of the divorce decree because his attorney was unavailable to provide it to him. At one point appellant did produce some legal papers that dealt with child custody, but MSgt Vernoski told him he needed to see the actual divorce decree. On Wednesday afternoon,

appellant finally provided a document entitled "Petition for Divorce" to MSgt Vernoski. MSgt Vernoski thought the document looked suspicious because it wasn't signed by JS, had numerous misspellings, and lacked legal terminology. He took it to the legal office for Major Davis to review. He had been keeping Major Davis informed of the progress of his inquiry into appellant's marital status. After turning the paperwork over to the legal office, MSgt Vernoski had no further involvement in the investigation. Major Davis discovered that the attorney appellant said represented him in the divorce had only represented him in a child custody matter. He also learned from the Circuit Court in Pike County, Kentucky, that there was no record of appellant's divorce and that the person shown as the judge on the purported divorce decree was not a judge on that court. The Air Force Office of Special Investigations then took over the case.

MSgt Vernoski did not warn appellant of his Article 31, UCMJ, rights at any time during their various discussions about his marital status. MSgt Vernoski testified that he was trying to help JS clarify her dependent status, and he never actually suspected appellant was not divorced and might be lying to him until appellant produced the questionable divorce decree. At that point, he turned the matter over to the legal office and never questioned appellant further. Appellant's oral statement that he was divorced was the basis for one of the false official statement specifications. The act of providing the fake divorce decree to MSgt Vernoski was the basis for another false official statement specification and the impeding an investigation specification. The false official statement charge to which appellant pled guilty dealt with bank errors related to the bad checks he had written.

Failure to Suppress Appellant's Statements

We review the military judge's ruling on a motion to suppress to determine if he abused his discretion. While we review the judge's findings of fact under a clearly erroneous standard, we review his conclusions of law *de novo*. *United States v. Ayala*, 43 M.J. 296, 298 (1995). A servicemember is

entitled to rights advisement under Article 31(b), UCMJ, "only if he is a suspect at the time of the questioning and the questioning itself is part of an official law-enforcement investigation or disciplinary inquiry." *United States v. Good*, 32 M.J. 105, 108 (C.M.A. 1991). "The test to determine if a person is a suspect is whether, considering all facts and circumstances at the time of the interview, the government interrogator believed or reasonably should have believed that the one interrogated committed an offense." *United States v. Kendig*, 36 M.J. 291, 294 (C.M.A. 1993).

The military judge found that, under the circumstances of appellant's case, MSgt Vernoski was not acting in either a law enforcement or disciplinary capacity. The judge found that MSgt Vernoski was trying to help JS clarify her dependent status and that he did not suspect appellant of the offense of bigamy. He further found "that there were insufficient circumstances that caused or reasonably should have caused Sergeant Vernoski to suspect the accused of the criminal offense of bigamy." These findings are supported by the record and the judge's explanation of his findings. *See United States v. Pownall*, 42 M.J. 682, 687 (Army Ct. Crim. App. 1995), *pet. denied*, 43 M.J. 229 (1995).

JS was not sure of her current marital status when she contacted the unit. She admitted that she might be divorced, but she wanted to know for sure. She based her concerns on a call from appellant's purported new wife. MSgt Vernoski was aware that appellant and JS had been living apart for some time. Even though he thought he remembered appellant telling him in the fall of 1995 that he was still married to JS, appellant had been truthful with him during the counselling about dependent support only a few months earlier. Appellant's initial representation that he was divorced was supported by the DEERS records showing SS as appellant's current wife and by the fact that MPF personnel told MSgt Vernoski that appellant would have needed a divorce decree to make that change. Appellant's excuses to MSgt Vernoski that his attorney was in court and unavailable to provide a copy of the divorce decree were not suspicious on their face or unusual

from the standpoint of MSgt Vernoski's experience. Although it may be a close call, we, like the military judge, are convinced that MSgt Vernoski neither believed appellant was a suspect nor reasonably should have believed him to be a suspect at any of the times he questioned him. As soon as he saw the fake divorce papers and became suspicious, he immediately turned them and any further inquiry over to the legal office. The military judge's factual findings were not clearly erroneous and his conclusions of law were correct. The judge did not err by failing to suppress appellant's statements to MSgt Vernoski.

We note that, even if MSgt Vernoski had been required to provide appellant with Article 31(b) rights warnings as to the offense of bigamy, appellant made no incriminating statements to him concerning bigamy. *See United States v. Schake*, 30 M.J. 314, 320 (C.M.A. 1990); *Pownall*, 42 M.J. at 688. Further, appellant's false oral and written statements to MSgt Vernoski that he was divorced could permissibly be used as the basis for false official statement charges. R.C.M. 304(b)(1). His written statement (the fake divorce decree) could also be used as the basis for the offense of impeding an investigation, a crime totally separate and distinct from bigamy. *See United States v. Lewis*, 43 M.J. 886, 888 (A.F. Ct. Crim. App. 1995), aff'd, 46 M.J. 19 (1997).

Unreasonable Multiplication of Charges

Appellant moved at trial to have the false official statement and impeding an investigation specifications, which were both based on appellant's act of providing a fake divorce decree to MSgt Vernoski, found multiplicious for findings and sentencing. The judge denied the motion. The government contends, citing our decision in *United States v. Erby*, 46 M.J. 649 (A.F. Ct. Crim. App. 1997), that appellant has waived the issue of unreasonable multiplication of charges by failing to raise it at trial. *See also United States v. Earle*, 46 M.J. 823, 825 (A.F. Ct. Crim. App. 1997). They contend that the military judge could not have erred in reviewing the command's exercise of charging discretion since he was never asked to review it.

At the time of trial, our decisions in *Erby* and *Earle* had not been rendered. Although the defense did not specifically use the terminology "unreasonable multiplication of charges" or refer to either R.C.M. 307(c)(4) (Discussion) or R.C.M. 1003(c)(1)(C) (Discussion), trial defense counsel did argue that the two offenses arose out of the exact same act, and, in fairness, they should not be separately punished. The military judge did have available the guidance from our superior court that "military judges must still exercise sound judgement to ensure that imaginative prosecutors do not needlessly 'pile on' charges against a military accused." *See United States v. Morrison*, 41 M.J. 482, 484 n. 3 (1995); *United States v. Foster*, 40 M.J. 140, 144 n. 4 (C.M.A. 1994). Under these circumstances, appellant adequately raised the issue at trial.

However, the judge was specifically relying on our guidance that "the concept of multiplicity for sentencing does not exist any more under our current law" and that "[i]f offenses are separate for finding purposes, they are also separate for sentencing purposes." *United States v. Lloyd*, 43 M.J. 886, 888 (A.F. Ct. Crim. App. 1995), *aff'd*, 46 M.J. 19 (1997). We reiterated this position a month after the completion of appellant's trial when we stated "if offenses are separate for findings, they are separate for sentencing. The converse is also true; if offenses merge for sentencing, they also merge for findings." We were telling trial judges that granting only sentencing multiplicity relief was no longer a correct path to follow when the defense raised a constitutional multiplicity issue. *United States v. Dolbow*, 44 M.J. 814, 815 (A.F. Ct. Crim. App. 1996), *pet. denied*, 46 M.J. 424 (1997). It was not until six months after appellant's trial that we first encouraged military judges to exercise their equitable power to adjust the maximum sentence in cases where they found there had been an unreasonable multiplication of charges or "piling on" during the charging process but no multiplicity in the constitutional sense. *Erby*, 46 M.J. 652. Since the military judge in appellant's case was following the legal guidance available to him, we would not have expected him to grant appellant any relief, and he did not abuse his discretion by failing to do so.

Further, we are convinced that, even if the military judge had adjusted appellant's maximum sentence downward using his equitable power or based on the old multiplicity for sentencing approach, it would not have affected the members' sentence. Treating the two offenses in question as one for sentencing would have reduced the maximum confinement period from 28 to 23 years. Appellant received no confinement from the members, and, based on his offenses, we are convinced he would still have received a bad-conduct discharge and reduction to E-1. We are also convinced appellant's sentence was appropriate for his offenses. Article 66(c), UCMJ.

Ex Post Facto Nature of Article 57(a)

Finally, appellant contends that the amendment to Article 57(a), UCMJ, which became effective on April 1, 1996, violates the *Ex Post Facto* Clause of the United States Constitution with respect to his case. For appellant, these amendments made his reduction in rank effective 14 days after the sentence was adjudged rather than at the later time of the convening authority's action in his case. Appellant's *ex post facto* arguments were resolved by the United States Court of Appeals for the Armed Forces in *United States v. Gorski*, ____ M.J. ____ No. 97-0034 (Nov. 18, 1997). Accordingly, "[c]ollection of any forfeitures, and execution of the reduction in grade prior to the date of the convening authority's action are hereby declared to be illegal. Any [such illegal] forfeitures already collected from appellant and any pay and allowances withheld because of [an] illegal reduction in grade will be restored. The record of trial is returned to The Judge Advocate General . . . for appropriate action." *Id.*, slip op. at 11. This case need not be returned to this Court following administrative correction unless further appellate review is required.

Other Issues

Although not raised by appellant, we noted one other issue in this case which merits brief discussion. During his

instructions to the members on the Article 123a, UCMJ, bad check offense, the military judge curiously stated several times that this offense is "commonly referred to as larceny by check." We would not find that to be a correct characterization since larceny by the use of a check can be, and frequently is, charged as larceny under Article 121, UCMJ. In fact, Article 123a does not necessarily require a permanent intent to deprive the owner of the funds, a temporary deprivation will do, while Article 121 larceny clearly does require a permanent intent to deprive. We point this out only for technical accuracy and not because this mischaracterization of the offense was an error requiring corrective action. However, when instructing the members on the lesser included offense of the Article 123a offense, the military judge misstated the elements. Concerning the lesser included offense of dishonorably failing to maintain sufficient funds, in violation of Article 134, UCMJ, he incorrectly informed them that the second element required "the check was made and uttered **with the intent to defraud.**" (Emphasis added.) While intent to defraud was required for the Article 123a offense, it is not part of the elements for the Article 134 offense. Since the members, nonetheless, found appellant guilty of only the lesser included Article 134 offense with its lesser maximum punishment, we find no prejudice to appellant from this instructional error.

The approved findings of guilty and the sentence are correct in law and fact and, on the basis of the entire record, are

AFFIRMED.

Senior Judge PEARSON and Judge SPISAK concur.

OFFICIAL
LAURA L. GREEN
Clerk of Court